Petition

Office - Supreme Court, U.S.
FILED
JAN 13 1982
ALEXANDER L. STEVAS,
CLERK

81-1323

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

MURPHY TUGBOAT COMPANY,
Petitioner,

VS.

SHIPOWNERS & MERCHANTS TOWBOAT CO., LTD.; BAY CITIES TRANSPORTATION CO.; THOMAS B. CROWLEY; CROWLEY MARITIME CORP.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Ninth Circuit

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QUESTIONS PRESENTED

I

In a private antitrust action where Petitioner has proved the fact of injury caused by Respondents' monopolistic exclusion of Petitioner from a profitable segment of the market, may Petitioner's damage verdict for lost profits be based upon evidence that, absent Respondents' exclusionary acts, the established market prices would have remained unchanged; or is there a rule of law that in all cases precludes proof of the amount of damages based upon the actual prices charged by the monopolist, because of an irrebuttable legal presumption that a monopolist will always cut prices to exclude new competition?

II

In a private action to enforce the antitrust laws of the United States, where a jury specifically found that the Respondents' illegal monopolization proximately caused injury to Petitioner and those findings have been upheld by both the district court and the court of appeals, do the decisions of this Court and the stated policy of section 4 of the Clayton Act to encourage such actions permit judgment to be entered in favor of Respondents?

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Murphy Tugboat Company v. Shipowners & Merchants Towboat Co. Ltd., et al.*, No. 79-4266 below.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, submitted herewith in a separate volume) is reported as *Murphy Tugboat Company v. Shipowners & Merchants Towboat Co., Ltd., et al.*, 658 F.2d 1256 (9th Cir. 1981). The opinion of the district court (Appendix B) is reported as *Murphy Tugboat Company v. Shipowners & Merchants Towboat Co., Ltd.*, 467 F.Supp. 841 (N.D. Cal. 1979).

JURISDICTION

The district court filed its opinion on March 6, 1979, and timely notice of appeal was filed in the district court on March 26, 1979. The Amended Opinion of the court of appeals was filed on October 15, 1981, and the Petition for Rehearing was denied on October 15, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sherman Act of July 2, 1890, c. 647, 26 Stat. 209, as amended:

Section 2 (15 U.S.C. § 2):

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .

Clayton Act of October 15, 1914, c. 323, 28 Stat. 730, as amended:

Section 1 (15 U.S.C. § 12):

> "Antitrust laws" as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety. . . .
>
> "Commerce", as used herein, means trade or commerce among the several States and with foreign nations. . . .

Section 4 (15 U.S.C. § 15):

> Any person who shall be injured in his business or property by reasons of anything forbidden in the antitrust laws may sue therefor in any district court of the

United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

A. Statement of Material Facts

Petitioner Murphy Tugboat Company is a firm that between 1971 and 1975 was in the business of providing commercial tugboat docking and undocking services to ships navigating on San Francisco Bay and its navigable environs. This is the relevant product and geographic market found by the jury and accepted by the courts below. E.g., 468 F.Supp. at 848-849. Petitioner during this period competed with Respondents for this business in that market.

Respondents are one individual and three corporations who have engaged in the business of providing tugs to dock and undock vessels ("ship assist business") on San Francisco Bay for most of this century.[1] During the 1971-1975

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[1]Thomas B. Crowley has, at all relevant times, personally controlled the corporate defendants, both by substantial personal and related family ownership, and by ongoing operational management with respect to the monopolistic activities in question. *See* 467 F. Supp. 846, 851-853. Since its creation in the early 1970's, Crowley Maritime Corporation has been owned by Crowley and his family, and was directly controlled by Crowley. Shipowners & Merchants Towboat Co., Ltd. and Bay Cities Transportation Company were the wholly-owned operating subsidiaries of Crowley Maritime. Prior to the formation of Crowley Maritime, Bay Cities and Shipowners were separately incorporated companies jointly owned and operated by Crowley and his family. Because of their interrelated status, we will refer collectively to this group as "Respondents."

period of competition with Murphy Tugboat Company, the Respondents possessed between 70% and 80% of the market for tug-assisted docking and undocking in this vital port, and hence had "monopoly power in the relevant market." 467 F.Supp. at 849.

In 1969, a strike by a union representing tug crewmembers completely shut down Respondents' tug operations in San Francisco Bay. At this time, Murphy-Pacific Marine Salvage Company ("Murphy-Pacific") began offering its tugs for ship assist services in the San Francisco market. After many months, the strike ended and Respondents' tugs reentered the market, now in new competition with Murphy-Pacific. Respondents maintained their pre-strike ship assist tariffs, despite large labor-cost increases caused by the new union contract.

In 1971 Murphy-Pacific left the market. In doing so, it agreed to sell its tugs to Respondents on the express agreement imposed by Crowley that Murphy-Pacific would stay out of the ship assist business and Respondents would stay out of the salvage business. *E.g.*, 467 F.Supp. at 850. Petitioner Murphy Tugboat Company was founded at this time.

During the period of Petitioner's competition in the market, the Respondents had a policy of refusing, except in emergencies, to provide tug services to vessels that were being assisted by Petitioner's tugs. Both the jury and the lower courts found that because of the effect of Respondents' huge market share, this boycott policy injured Petitioner by deterring the hiring of Petitioner's tugs by customers who knew that if the need for additional tugs arose

during the operation, and the Petitioner could not provide them itself, Respondents' tugs would not be available. *E.g.*, 467 F.Supp. at 847, 850, 851, 862; 658 F.2d at 1258. The district court also acknowledged the injurious effect of these practices on competition in general. 467 F.Supp. at 861.

This boycott policy operated to exclude Petitioner primarily from ship assist jobs involving larger ships and ships not under their own power ("flat tows"), since these jobs were much more likely to require additional tugs. *E.g.*, 658 F.2d at 1258. The per-tug market price for this large-ship and flat-tow work was considerably higher than the per-tug price for work on smaller ships. 467 F.Supp. at 847; 658 F.2d at 1258. Petitioner was thus excluded from the most profitable segment of the market by the boycott policy, and relegated to operating primarily on the less profitable smaller ships.

The evidence was that this boycott policy was not followed by any tug company operating in other ports of the United States; also, other companies owned and controlled by Respondent in other ports where they did not enjoy a monopoly position did not follow such a policy. The Respondents' "business justification" arguments were rejected by the jury and the trial court. *E.g.*, 467 F.Supp. at 850.

In the fall of 1975, after sustaining large losses due to its exclusion from the more profitable, large-vessel/flat-tow segment of the market, Petitioner terminated operations. Eventually Respondents abandoned the boycott policy completely, and worked freely alongside the tugs of other companies with prices at or above the previous levels.

Petitioner Murphy Tug filed this lawsuit in the district court in 1974 pursuant to section 4 of the Clayton Act (15 U.S.C. § 15), alleging violations of sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2).

After 28 days of trial and five days of deliberation, the jury returned a verdict in Petitioner's favor, awarding $700,000 in damages, finding that Respondents' boycott policy, coupled with their overwhelming market power, constituted illegal monopolization of the ship assist market in San Francisco Bay.

B. The Opinions Below

The district court found that "[t]his record amply supports the jury's verdict on the monopolization issue." 467 F. Supp. at 851. The lower court also found that these acts had in fact injured Petitioner in its business by causing it to be excluded from a profitable segment of the market. Nevertheless, the district court granted a judgment notwithstanding the verdict in favor of Respondents, on the sole ground that the amount of the damage award was "wholly speculative." 467 F.Supp. at 866.

On appeal, the court of appeals again upheld the jury's findings of antitrust liability and the fact that this violation injured Petitioner; it also found, however, that the amount of damages was based "on speculation or guesswork" and thus affirmed judgment in favor of Respondents. 658 F.2d at 1263.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals holds that the previously settled rules governing the proof of the amount

of antitrust damages that permit proof of the amount of damage by "a just and reasonable estimate of the damage based on relevant data" (*Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946)), do not apply in market exclusion cases to proven monopolists with power to control market price. *Bigelow* held, in the context of a concerted boycott in violation of section 1 of the Sherman Act, that the excluded competitor could prove damages by using the market performance of the defendants during the period of the exclusionary restraint as a benchmark to measure the profits it had lost. Nothing in this Court's opinion in *Bigelow* suggests that this method of proving damages applies only to section 1 cases and not to monopolization cases under section 2 (15 U.S.C. § 2). Nonetheless, the decision in this case means that, as a matter of law, an excluded competitor may not prove damages caused by market exclusion using as a benchmark the prior market prices established by the monopolist in the market from which the plaintiff was excluded. This holding is founded upon the creation of an irrebuttable legal presumption that a monopolist faced with a new entrant will always reduce its prices to preserve its monopoly share (and thereby exclude new entrants) on the assumption that maximum market share always yields maximum profits.

Because the presumption is contradicted point-blank by trial evidence to the contrary concerning Respondents' actual conduct in this case, and because it ignores settled economic analysis of the price behavior of dominant firms, the holding of the court of appeals creates a special exception to the proof of damage principles of *Bigelow* in competitor cases involving market exclusion by monopolists that have the power to control prices.

Petitioner filed this lawsuit over seven years ago, alleging that it was run out of business by unlawful monopolistic acts of Respondents. After years of complex pretrial procedures, a lengthy jury trial and a detailed and lengthy scrutiny of that verdict by both the federal district court and the court of appeals, there is one thing that is not disputed: Petitioner was correct. The jury and both lower courts have concluded two things: (1) the Respondents were guilty of monopolizing the tug shipwork industry in the San Francisco Bay area, and (2) Petitioner was in fact damaged directly by the illegal activities of Respondents.

The other undisputed fact is that despite these repeated findings of liability and the fact of damage, the proven monopolists have won and the victim has lost. Judgment has been entered for Respondents, including an award of costs against Petitioner. The Respondents have succeeded in convincing the lower courts that the proof concerning the *amount* of these damages was "speculative". The holding below is that, despite *Bigelow*, a monopolist with power to control market price has a presumption that it will always exercise that price power by lowering prices to exclude new competition, and evidence to the contrary must be disregarded.

The result in this case carves out a substantial and unprecedented exception for monopoly cases from this Court's settled antitrust rules governing proof of antitrust damages. This new exception should be reviewed and corrected.

Additionally, given the fact that Petitioner has proven that Respondents violated section 2 and injured Petitioner to the satisfaction of the jury and both lower

courts, judgment should not be granted to Respondents. This Court should grant the writ, decide this important question and declare that proven antitrust violators are not entitled to judgment and costs.

I

IN OVERTURNING THE JURY'S DAMAGE AWARD, THE COURT OF APPEALS CREATED NEW AND UNWARRANTED RULES REGARDING PROOF OF ANTITRUST DAMAGES IN MONOPOLIZATION CASES

This case involves proven monopolists who have driven the Petitioner out of the market by excluding it from profitable business through the illegal use of monopoly power.

In cases involving illegal exclusion from a profitable market, the resolution of damage issues need not be based upon the concrete, detailed proof available in other contexts, and a jury damage award may be based upon "reasonable inference from proof of defendants' wrongful acts and their tendency to injure plaintiff's business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes. . . ." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969).

Rather than viewing the evidence in the light most favorable to Petitioner's jury verdict and giving Petitioner the benefit of all inferences that might fairly have been drawn by the jury (*Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962)), the court of appeals ignored the evidence and instead decided this case

on the basis of a false legal presumption that nullified Petitioner's proof. The court of appeals has reached a conclusion that is inconsistent with both the trial record and settled economic theory.

A. Petitioner's Damage Evidence

In estimating the amount of damages in an antitrust case involving market exclusion, the jury is typically confronted with the task of determining first the volume of business plaintiff lost because of the illegal restraint, and second the amount of profit that volume would have generated. Usually, the amount of profit is determined by subtracting an estimate of the extra costs that would have been incurred by the plaintiff from the price at which the jury finds the product or service would have been sold. *See William Goldman Theatres v. Loew's, Inc.*, 69 F.Supp. 103 (E.D.Penn. 1946), *aff'd* 164 F.2d 1021 (3rd Cir. 1948), *cert. denied*, 334 U.S. 811 (1948).

This was Petitioner's proof at trial. The volume of business lost because of its exclusion from the large-ship and flat tow segment of the market was measured by using as a benchmark its share of the small-ship market segment, in which it freely competed. Petitioner presented evidence showing that these market segments were comparable from the point of view of tug operators and ship assist customers, and asked the jury to find that it would have had a market share of the jobs from which it was excluded at least one-half as large (14%) as its historical market share of the jobs where Respondents' restraint did not operate (28%). Costs associated with this lost business were properly calculated and taken into account.

With respect to the price at which this lost volume would have been sold, Petitioner presented evidence that absent the illegal restraint, Petitioner's services would have been priced somewhat lower than Respondents' historical prices. Thus, the jury's damage award required evidence that Respondents' prices would have remained substantially unchanged in the absence of their illegal acts.

Petitioner presented this evidence. The evidence showed that after Petitioner filed this lawsuit, Petitioner's damage assumptions became reality for subsequent competitors. Respondents *did* end their boycott policy, and new competitors *did* enter the market at a price slightly lower than Respondents' prices. In the face of this new competition, Respondents did *not* lower their rates, and in fact, ultimately raised them. This evidence was uncontested and Respondents offered *no evidence* from which the jury could infer that they would have done otherwise had they competed with Petitioner absent the boycott policy.

B. The Court of Appeals' Reasoning

The court of appeals nullified the jury's verdict, based upon a holding that as a matter of law (despite the contrary evidence that Respondents would have maintained their price structure), a reasonable jury could not find that Respondents would have maintained prices when competing with Petitioner. 685 F.2d at 1262.[2] The court of ap-

[2]While raising some questions regarding Petitioner's volume comparison between the small-ship and large-ship segments of the ship assist market, the court of appeals did not hold that a reasonable jury could not have found the two segments comparable enough to support the use of one as a yardstick to measure market penetration in the other.

peals reasoned that a jury must always assume a competitor will do that which will maximize its profits. From that premise, without evidence or explanation, the court concluded that a jury must conclude that a dominant firm that could cut prices to exclude new competition will always do so to maintain its market share because that course would necessarily maximize profits. The court of appeals thus decided for itself that Respondents would have lowered prices in response to Petitioner's competition. Since Petitioner's jury award was based upon proof that Respondents' prices would not have been reduced, the court of appeals held the damage proof "too speculative" to stand. 658 F.2d at 1263.

This holding necessarily incorporates two unstated assumptions: first, that competitors always *know* which course of action will be the most profitable, and will never choose an unprofitable path through mistake or simple inflexibility; and second, that under all possible conditions, cutting prices in response to new competition will be the most profitable course of action for a dominant firm to take in response to new competition. *See* 658 F.2d at 1262. These assumptions, for which the court of appeals cited no evidence and made no argument, are erroneous.

First, there is no reason to presume that competitors, especially those who for years have depended upon illegal monopolistic tactics to oust competition, would always succeed in devising the correct and most profitable course of action from the myriad of possible choices. In fact, empirical studies have shown that competitors often mistakenly choose the least profitable course because of overconservatism or adherence to false assumptions. *See*

F. Scherer, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 145 (1970).

Second, the premise of the court of appeals that the most profitable course of action to be followed by a dominant firm with market power when faced with emerging competition is to lower prices is demonstrably false. Often a firm with a large market share cannot cut prices to maintain volume without having the loss in profit caused by these lowered prices exceed the gain in profit from the volume that would be recaptured from the new competition.[3]

Finally, the court of appeals' theoretical speculation is directly contradicted by empirical studies by economists that have firmly established since the late 1930's that competitors with market power avoid price-cutting, since they expect matching cuts by rivals will nullify any profit gains.

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[3]The possible variations are infinite. However, this hypothetical illustrates the inherent falseness of the court of appeals' assumption. Suppose with 100% of the market (100 jobs), the Respondents had gross profits of $4.00 per job. Suppose further that competition from the Petitioner reduced the Respondents' market share to 80%. Consequently, the sale of 80 jobs at historical prices will produce $320 of gross profit (80 × $4 = $320). If Respondents lowered their price by $1.00 per job, those 80 jobs that previously yielded $320 would now yield only $240 of gross profit (80 × $3 = $240). In order simply to break even after the price reduction, Respondents would have to increase these 80 jobs to 106⅔ jobs (106⅔ × $3 = $320). This means that Respondents would have to increase their 80% market share to 106⅔% of the historical market; that is, the price reduction would have to eliminate the new competition completely, and also create a demand for new jobs. This is very unlikely in an industry such as is involved in the present case, where the demand for tugs is fixed by shipping schedules and considerations of safety, *not* by the cost for services.

See F. Scherer, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 145-49 (1970).

But even more important than the lack of support for the court of appeals' conclusion as a general rule, is that the court of appeals has ignored the fact that this conclusion is contradicted by the uncontested facts of this case. The court of appeals held as a matter of law that in the absence of their illegal boycott, the Respondents would have reacted to new competition by lowering their prices when it is uncontested that when the boycott ended, Respondents did not lower their prices, but actually ultimately raised them.

The court of appeals engaged in judicial speculation in an attempt to derive some kind of "general truth" that conflicts with the jury's verdict and the evidence on which it was based. This is an interference of the worst sort with the province of the jury to decide the relevant facts. *Wilkerson v. McCarthy*, 336 U.S. 53 (1949).

C. The Effect of the Court of Appeals' Holding

The effect of the decision of the court of appeals goes far beyond the injustice done to the Petitioner in this case, and amounts to a repudiation of established authority that cannot be tolerated.

The decision below holds that in cases involving the illegal exclusion of a competitor from a profitable market by the anticompetitive actions of a dominant firm with the power to set market prices, the *jury must find in all cases* that in the absence of its anticompetitive practices, this

dominant firm will cut its prices to minimize market penetration of the new entrant.

This holding drastically restricts (and in this case eliminates) the methods by which a plaintiff may prove the amount of damages in a case where injury is caused by a dominant defendant possessing the power to set market prices. This Court's decision in *Bigelow, supra,* illustrates the crippling effect of the court of appeals' decision on private antitrust enforcement in monopoly cases.

In *Bigelow,* a plaintiff theatre operator was excluded from first-run movies by a concerted boycott in violation of section 1 of the Sherman Act. The conspiracy was among first-run theatre owners. Plaintiff, who had been deprived of the right to show first-run movies, successfully proved the amount of his damages by comparing his earnings while operating under the illegal restraint with the demonstrated market performance during the same period of one of the defendants' comparable theatres, upon which the restraint did not operate. *Bigelow, supra,* 327 U.S. at 257-258. This court rejected arguments that in the absence of the conspiracy, conditions such as prices would have been different under freely competitive conditions, stating simply that "[a]ny other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim." *Bigelow, supra,* 327 U.S. at 263-64.

If the presumption of the court of appeals is accepted, in a case different from *Bigelow* only in that the restraint is not being applied by a conspiratorial group of competi-

tors, but, as here, by a monopolist with the power to control the market price, the plaintiff can no longer use the demonstrated market performance of the defendants as a benchmark in measuring damages. Because it will be presumed as a matter of law that the monopolist would respond to plaintiff's unrestrained competition by cutting prices in an effort to protect market share, any damage claim like the one in *Bigelow,* based upon a comparison of the historical earnings of the restrained plaintiff with the unrestrained earnings of the defendants must fail.

This unreasonable limitation on an illegally excluded antitrust plaintiff's ability to make "a just and reasonable inference" of the amount of damages is unsupported by any opinion of this Court; resting on an arid presumption that is both unsupported by economic theory and in direct conflict with the observed behavior of Respondents, it strikes a powerful blow to the enforcement of the antitrust laws in monopoly cases.

II

IN A CASE WHERE PETITIONER, A PRIVATE ANTITRUST PLAINTIFF, HAS SUCCESSFULLY PROVEN BOTH AN ANTITRUST VIOLATION BY RESPONDENTS AND THE FACT OF INJURY CAUSED BY THIS VIOLATION, A JUDGMENT SHOULD NOT BE GIVEN TO PROVEN ANTITRUST VIOLATORS

The second issue is straightforward and fundamentally important to private antitrust enforcement. A defendant in an antitrust suit, proven guilty of monopolization, has proximately injured the plaintiff's business; however, for some reason, the court finds a flaw in the proof of the *amount* of plaintiff's damages. For whom then is judgment issued?

The answer of the lower courts in this case was to give judgment to the proven law violator. This ignores both the law as it has developed and the policy to encourage the private enforcement of the antitrust laws.

In a footnote to its opinion, the court of appeals states that they have not decided "whether an antitrust plaintiff who has established injury but proved no quantum of damages may be entitled to nominal damages and/or costs." 658 F.2d at 1263 n.6. But the award of judgment to Respondents amounts to just such a decision. Petitioner's demand for judgment in the lower courts necessarily encompassed, at a minimum, recovery of nominal damages and costs. Prior to argument on appeal Petitioner tried to bring this issue to the fore by citing as additional authority to the court of appeals *Knutson v. Daily Review,*

479 F.Supp. 1263 (N.D. Cal. 1979), a recent case dealing exclusively with this issue and directly in Petitioner's favor. The Petition for Rehearing in the court of appeals also specifically detailed why—regardless of the disposition of the damage award—judgment should not be entered for the proven monopolists. The court of appeals tried to sidestep this issue, contending it was untimely raised. However, the issue was timely raised as a necessarily included component, inherent in Petitioner's efforts to obtain judgment.

A. The Current Case Law

Though this Court has never ruled on the question, a well-reasoned series of decisions has held that proof of an antitrust violation and injury proximately caused thereby entitles the plaintiff to a judgment and nominal damages, including statutory costs.

The first case to so hold was *United Exhibitors v. Twentieth Century Fox F.D. Corp.*, 31 F.Supp. 316 (W.D.Penn. 1940); "if no specific damage were shown by an established conspiracy, at least nominal damages would accrue to plaintiffs . . . ." 31 F.Supp. at 317. This case was followed a few years later by *Finley v. Music Corp. of America*, 66 F.Supp. 569 (S.D.Cal. 1946), where after setting aside a jury damage award in an antitrust case for failure to provide substantial evidence proving the amount of damages, the district court gave judgment to plaintiff, awarding costs and attorney's fees. *Id.* at 571.

Since these two early cases, this rule has been followed repeatedly in cases where courts have found a weak evidentiary link in the proof of the *amount* of damages in antitrust cases.[4]

The one clear exception to this rule is *Herman Schwabe, Inc. v. United Shoe Mach. Corp.*, 297 F.2d 906 (2d Cir. 1962), *cert. denied* 369 U.S. 865 (1962) (*"Schwabe"*). There the Second Circuit implied that a judgment for guilty antitrust defendants must issue if the amount of damages is not proven.[5] In reaching this conclusion, the *Schwabe* court

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[4]*See Morning Pioneer, Inc. v. Bismarck Tribune Co.*, 493 F.2d 383 (8th Cir. 1974), *cert. denied* 419 U.S. 830 (1974) [no evidence showing amount of damages caused by defendant's attempt to monopolize, nominal damages and judgment given to plaintiff upon proof of fact of injury]; *Siegfried v. Kansas City Star Co.*, 193 F.Supp. 427 (N.D.Mo. 1961), *aff'd* 298 F.2d 1 (8th Cir. 1962), *cert. denied* 369 U.S. 819 (1962) [same]; *Fleer Corp. v. Topps Chewing Gum, Inc.*, 501 F.Supp. 485 (E.D.Penn. 1980) [award of nominal damages and attorney fees in case of exclusion from profitable market necessary to vindicate policy behind antitrust laws]; *Knutson v. Daily Review, Inc.*, 479 F.Supp. 1263 (N.D.Cal. 1979); *Knutson v. Daily Review, Inc.*, 468 F.Supp. 226 (N.D.Cal. 1979) [proof of liability and fact of damage warrants judgment for plaintiff for nominal damages and attorney fees]; *see* Annotation, 21 A.L.R.Fed. 750, 756 (1974).

[5]In *Ledge Hill Farms, Inc. v. W.R. Grace & Co., Inc.*, 230 F. Supp. 638 (S.D.N.Y. 1964) the district court cited *Schwabe* as the law of the Second Circuit. However, *Ledge Hill Farms, Inc.* was a case where the jury found no proximately caused damage; because no fact of injury was found, this holding was, of course, correct. 230 F.Supp. at 639. Confusion pervades the many cases on this subject; cases that appear to deny awarding nominal damages to an antitrust plaintiff who has shown an antitrust violation that has *in fact* injured him, in reality are cases in which

relied on what it believed to be a holding in *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922) ("*Keogh*"), that an antitrust plaintiff cannot have judgment granted in his favor without first proving the amount of his damages. *See Schwabe* at 909. The Second Circuit in *Schwabe* has confused a situation where an antitrust plaintiff proved that he was injured by the illegal acts of the defendants, but is unable to prove the *amount* of this injury, with the case where a plaintiff is unable to prove that he was *in fact* injured at all.[6]

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no fact of damage has been shown. In these cases, of course, nominal damages are inappropriate, and judgment must be granted to the defendants. *See e.g., Hunter Douglas Corp. v. Lando Products, Inc.*, 235 F.2d 631, 638 (9th Cir. 1956); *Burnham Chemical Co. v. Borax Consolidated, Ltd.*, 170 F.2d 569 (9th Cir. 1948), *cert. denied* 366 U.S. 924 (1949); *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 184 F.Supp. 440, 449 (E.D.Pa. 1960), *aff'd on other grounds*, 297 F.2d 199 (3d Cir. 1961), *cert. denied* 365 U.S. 839 (1967); *Elyria, Lorain Broadcasting Co. v. Lorain Journal Co.*, 1960 Trade Cases, ¶ 69,831 (N.D.Ohio 1960); *Wolfe v. National Lead Co.*, 15 F.R.D. 61, 63 (N.D.Cal. 1953), *aff'd* 225 F.2d 427, 431 (9th Cir. 1955), *cert. denied*, 350 U.S. 883 (1955).

[6]In *Keogh v. Chicago & N.W. Ry. Co., supra*, a private plaintiff sought damages allegedly caused by a price-fixing conspiracy among railroad companies whose rate was regulated by the Interstate Commerce Commission. This Court held that plaintiff could not base a claim for damages on what the price would have been in the absence of the conspiracy because in order to prove such a claim, plaintiff would have to show that the I.C.C. would have approved a lower rate, something only the Commission, and not the courts could determine. *Keogh v. Chicago & N.W. Ry. Co., supra*, 260 U.S. at 163-64. The problem in *Keogh*, therefore, was that the plaintiff could not demonstrate that the prices would not have been approved by the Commission at the same rate, even in the absence of the conspiracy. In other words, the plaintiff could not show that he was *in fact* damaged by the defendants' illegal price-fixing conspiracy. *See Georgia v. Penn. R. Co.*, 324 U.S. 439, 453 (1945).

Thus, except in the Second Circuit, lower courts issue a judgment in favor of an antitrust plaintiff so long as he has proven that the illegal acts of the defendants have in fact injured him. This conflict should be resolved to ensure uniform application of the law, and effective enforcement of the antitrust laws.

B. The Policies Which Demand Reversal of the Court of Appeals Decision

Section 4 of the Clayton Act is "a bulwark of antitrust enforcement." *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968). It is not merely to provide private relief, but also "serve[s] as well the high purpose of enforcing the antitrust laws." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969).

This Court has repeatedly taken great pains to ensure that the inherent problems of proof created in private antitrust cases by the nature of the defendants' own illegal acts are not used as a shield to protect these defendants from private prosecution. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931).

These policy considerations apply with even greater force to the issue at hand. There is more at stake than who wins this lawsuit. Allowing proven monopolists to escape judgment, as they have here, merely because there

is uncertainty concerning *how much* damage they have done to a competitor is inconsistent with the teachings of this Court that a proven monopolist may not profit by its own wrongdoing at the expense of its victim. *See Bigelow v. RKO Radio Pictures, supra,* 327 U.S. at 264.

CONCLUSION

Petitioner's Sherman Act lawsuit brought competition to an important segment of the shipping industry in one of the nation's major ports. Formidable adversaries that for years choked off competition in the tugboat industry on San Francisco Bay have been shown, to the satisfaction of both judge and jury, to have violated this nation's anti-monopoly laws through the possession and illegal use of monopoly power.

However, because the court of appeals thought that the jury had insufficient evidence from which to estimate the amount of Petitioner's monetary losses, the proven monopolists have been declared victorious; no injunction or decree has issued that condemns Respondents' proven illegal actions, no redress has been given to Petitioner in compensation for the proven damage done to it by these illegal actions, and Respondents' court costs on appeal have been assessed against Petitioner.

In reaching this result, the court of appeals fashioned a new exception—for monopoly cases—to the rules governing proof of the amount of antitrust damages, an exception that seriously threatens the private enforcement of the antitrust laws.

Petitioner respectfully urges that the decision below was wrong, that the issues presented are important, and therefore prays that the petition be granted.

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Appendix

Office - Supreme Court, U.S.
FILED
JAN 13 1982
ALEXANDER L. STEVAS,
CLERK

81-1323

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

MURPHY TUGBOAT COMPANY,
Petitioner,

vs.

SHIPOWNERS & MERCHANTS TOWBOAT CO., LTD.; BAY CITIES TRANSPORTATION CO.; THOMAS B. CROWLEY; CROWLEY MARITIME CORP.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Ninth Circuit

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APPENDIX A

United States Court of Appeals,

Ninth Circuit.

MURPHY TUGBOAT COMPANY,

Plaintiff-Appellant,

v.

Thomas B. CROWLEY; Shipowners & Merchants Towboat Company, Ltd,; Bay Cities Transportation Company; Harbor Tug & Barge Company; Tug Sea Cloud, Inc.; Tug Sea Fox, Inc.; Tug Sea Horse, Inc.; Tug Sea King, Inc.; Tug Sea Lark, Inc.; Tug Sea Lion, Inc.; Tug Sea Prince, Inc.; Tug Sea Robin, Inc.; Tug Sea Rover, Inc.; Tug Valiant, Inc.; Tug Trojan, Inc.; Tug Atlas, Inc.; Tug Sea Wolf, Inc.; Crowley Launch & Tugboat Company; Cary-Davis Tug & Barge Company and Long Beach Tugboat Company, Inc., Defendants-Appellees.

No. 79-4266

OPINION

As Amended on Denial of Rehearing and Rehearing En Banc Oct. 15, 1981.

Appeal from the United States District Court for the Northern District of California.

Before WALLACE and POOLE, Circuit Judges, and SMITH,* District Judge.

WALLACE, Circuit Judge:

In this treble damages antitrust action pursuant to section 4 of the Clayton Act, 15 U.S.C. § 15, Murphy Tugboat Company appeals from a judgment n. o. v. in favor of defendant competitor tugboat companies. We affirm.

I

Defendants Shipowners & Merchants Towboat Company (Red Stack) and Bay Cities Transportation Company (Bay Cities) have been

long established in the ship assisting and ship towing business in San Francisco Bay and its tributaries. Defendant Crowley Maritime Corporation is a holding company for the two tugboat companies. Defendant Thomas B. Crowley was the principal officer of and had substantial ownership interest in each of these companies. Plaintiff Murphy Tugboat Company (Murphy) entered the ship assisting business in the fall of 1971. It remained in business until September 1975.

Ship assisting is the providing of tugs to aid vessels in docking or undocking. Although some ships under some circumstances can dock or undock without the use of tugs, they frequently require the assistance of one or more tugs. Tugs also perform "flat tows," moving vessels that are not under power.

From 1971 to 1975 Red Stack and Bay Cities performed at least 70% of the tug assisted

docking and undocking in San Francisco Bay (excluding military and other proprietary operations). Bay Cities, operating small tugs, served primarily small vessels--vessels of less than 14,000 net tons. It charged a flat rate per tug. Red Stack, operating larger tugs, usually served larger vessels. It used a grid tariff that took into account the size of the vessel and the length of the ship assist move. This grid tariff generally produced higher charges.

For some years prior to Murphy's entry into the market, Red Stack and Bay Cities had a policy of refusing, except in emergencies, to provide service to a vessel that was being assisted by tugs of another company. Red Stack and Bay Cities justified this policy in terms of the hazards of divided responsibility in ship handling. However, other companies under common control with Red Stack and Bay Cities, but operat-

ing in different harbors, did not have such a policy. There was evidence before the jury that large vessel and flat tow customers were deterred from hiring a Murphy tug by the knowledge that if the need for additional tugs arose during the operation, they would not be available.

Most docking and undocking requires the services of an inland pilot. The masters of Red Stack tugs were licensed inland pilots. When Red Stack tugs assisted a vessel, the master of one of the tugs would, at the vessel's request, serve as pilot. Red Stack made no extra charge for this service, but the Red Stack employee pilot collected a fee from the vessel. That fee was set by agreement between Red Stack and the Red Stack Pilots' Association (RSPA).

The jury awarded damages of $700,000 against several defendants for violation of section 2 of the Sherman Act, 15 U.S.C. § 2,

predicated on the boycott of ships making use of the tugs of other companies. The jury also awarded $100,000 against Red Stack for violation of section 1 of the Sherman Act, 15 U.S.C. § 1, by virtue of the RSPA agreement. The district judge granted judgment n. o. v. on the section 1 claim on the basis that the RSPA agreement was immune under the labor exemption of the Clayton Act, 15 U.S.C. § 17, and under the theory that a corporation and its employees cannot conspire to restrain competition within the meaning of section 1 of the Sherman Act. In addition, the district judge found that the jury damages award under section 1 was unsupported by the evidence. Judgment n. o. v. was granted on the section 2 claim, involving the boycott of ships assisted by other companies' tugs, because the district judge found that there was insufficient evidence supporting Murphy's damages theory on this claim. Murphy Tugboat Co. v. Shipowners &

Merchants Towboat Co., 467 F.Supp. 841 (N.D. Cal. 1979).

II

In asserting its section 1 claim, Murphy relies on the fact that when a Red Stack pilot was used, the fees, as fixed by the RSPA agreement, were lower than the fees otherwise charged by pilots in the San Francisco Bay area. Murphy argues that this agreement was anticompetitive and that Murphy was injured thereby because the Red Stack package price, including tugs and pilot fee, was lower as a result of the agreement than it otherwise would have been. If the Red Stack package price had been higher, Murphy contends that it would have been able either to have charged a higher price itself, while maintaining its market share, or to have maintained its price thereby obtaining a larger market share.

We conclude that if Murphy was injured by the RSPA agreement it was not "by reason of anything forbidden in the antitrust laws...." 15 U.S.C. § 15.[1] By keeping pilots on its payroll as part of its five man tugboat crews, Red Stack was indirectly able to make available to its customers pilot services at discount rates. Thus, the RSPA agreement amounts to an indirect subsidy given by Red Stack to its customers, at a cost to Red Stack of the wages of its pilot-employees.

Because Murphy did not itself provide pilot services, it is not in a position to, and does not, complain that it was injured by the RSPA fee, except as that fee was perceived by customers as a component of Red Stack's package price. See Cali-

[1] Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in part that

[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States... and shall recover threefold the damages by him sustained....

fornia Computer Products, Inc. v. International Business Machines Corp., 613 F.2d 727, 732 (9th Cir. 1979). Thus the test for whether the RSPA agreement constitutes an unreasonable restraint of trade of which Murphy can complain is the same test as that for whether Red Stack's overall pricing policies constitute anticompetitive conduct.

Because "[t]he antitrust laws ... were enacted for 'the protection of competition, not competitors,'" Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977), quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962), those laws do not prohibit non-predatory conduct that results in a lower price to the consumer. The antitrust laws do not require the erection of a price umbrella for the benefit of inefficient competitors. Thus, whether Murphy can complain of the RSPA agreement as a violation

of section 1 of the Sherman Act depends on whether the agreement was in furtherance of a scheme of predatory pricing.

Murphy concedes that Red Stack's prices were always significantly higher than Murphy's own--in some cases over twice as high. Murphy does not allege that Red Stack's marginal costs,[2] which would include the labor based cost of providing the indirect subsidy through the RSPA agreement, ever exceeded

[2] Marginal cost is defined as "the increment to total cost that results from producing an additional increment of output." Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv.L.Rev. 697, 700 (1975). "As a matter of short-run economic welfare, it is beneficial to increase production and lower prices so long as price exceeds marginal cost.... In the long run there are complications.... However, longrun economic welfare consequences are 'intrinsically speculative and indeterminate' and, in considering the limitations of the judicial process, are properly disregarded in formulating a test for predatory pricing. Areeda & Turner, Scherer on Predatory Pricing: A Reply, 89 Harv.L.Rev. 891, 896-97 (1976)." Janich Brothers, Inc. v. American Distilling Co., 570 F.2d 848, 857 n.9 (9th Cir. 1977), cert. denied, 439 U.S. 829, 99 S.Ct. 103, 58 L.Ed.2d 122 (1978).

Red Stack's price. Red Stack's pricing, therefore, was not predatory for the reasons stated by the district court in Murphy Tugboat Co. v. Crowley, 454 F.Supp. 847, 853-57 (N.D. Cal. 1978). Pierce Packing Co. v. John Morrell & Co., 633 F.2d 1362, 1365-66 (9th Cir. 1980); see California Computer Products v. International Business Machines Corp., supra, 613 F.2d at 742-43; Janich Brothers, Inc. v. American Distilling Co., 570 F.2d 848, 857-58 (9th Cir. 1977), cert. denied, 439 U.S. 829, 99 S.Ct. 103, 58 L.Ed. 2d 122 (1978); Hanson v. Shell Oil Co., 541 F.2d 1352, 1358-59 (9th Cir. 1976), cert. denied, 429 U.S. 1074, 97 S.Ct. 813, 50 L.Ed. 2d 792 (1977). As Red Stack's overall pricing conduct was legal, the RSPA agreement in furtherance of that conduct was also legal.

Because we conclude as a matter of law that the RSPA agreement is not a contract or conspiracy in restraint of trade within

the meaning of section 1 of the Sherman Act of which Murphy can complain, we need not consider whether that agreement would fall under either the labor exemption to the antitrust laws, 15 U.S.C. § 17, or the principle that agreements between a corporation and its employees do not constitute a conspiracy under section 1, see Chapman v. Rudd Paint & Varnish Co., 409 F.2d 635, 643 n.9 (9th Cir. 1969).

III

Even though the district judge concluded that the jury could properly find the boycott illegal and that it had an adverse impact on Murphy, he held that Murphy's proof of damages was insufficient in its Sherman Act section 2 claim. Although Murphy was not entirely consistent on the legal theory underlying its damages computation pursuant to section 2, the final theory contains two damage components. The

first is lost profits attributable to Red Stack's boycott of jobs on which a Murphy tug was used, up to the time that Murphy ceased operation. The second component was lost future profits for the five years following its demise.

We may affirm the district judge's granting of judgment n. o. v. on these damages issues only if the district judge's conclusion is the only reasonable one "[viewing] the evidence in the light most favorable to the party in whose favor the jury verdict was rendered and [giving] that party the benefit of all inferences that might fairly have been drawn by the jury." Fount-Wip, Inc. v. Reddi-Wip, Inc., 568 F.2d 1296, 1300 (9th Cir. 1978). Moreover, in a case in which the defendant has prevented the plaintiff's entry into a market, we must adopt a special solicitude towards the proof of damages.

[E]ven where the defendant by his own

> wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances "juries are allowed to act upon probable and inferential, as well as direct and positive proof." Story Parchment Co. v. Patterson Co., [282 U.S. 555], 561-4, [51 S.Ct. 248, 250-51, 75 L.Ed. 544]; Eastman Kodak Co. v. Southern Photo Co., [273 U.S. 359], 377-9, [47 S.Ct. 400, 404-405, 71 L.Ed. 684]. Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim.

Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1946).

A. Past Profits.

Murphy attempted to establish that prior to its going out of business it lost profits due to the Red Stack boycott. The district judge ruled its evidence was insufficient. Murphy's theory was that the boycott effectively prevented it from entering the more profitable segment of the ship assist market--that segment embracing ships of over 14,000 tons and flat tows. The amount of these lost profits was not directly established. An expert economist did testify that, under his assumptions and absent the boycott, Murphy would have made a sufficient profit in the large vessel and flat tow market segment to bring Murphy's total shipwork business out of the red and into the black. Because no evidence was admitted of the dollar amount by which Murphy would have exceeded the breakeven point, the expert witness's understanding of Murphy's losses constituted the only lost past

profits figure before the jury. Thus, Murphy's losses are relevant, not because those losses themselves were directly attributable to the illegal conduct, but because Murphy's expert witness used the loss figure as a bench mark by testifying that lost past profits would at least have equaled that figure. The figure, according to Murphy's citation to the record, came from Roger Murphy's testimony on the basis of his income tax records.[3] We need not, however, start with those tax records and engage in a dollar for dollar examination of the maximum figure supported by the record, because we conclude that the damages theory has fundamental problems that make it unacceptable as a whole, whatever the appropriate bench mark figure were to turn out to be.

[3] Thus, any other evidence of losses, for example an accountant's testimony as to going out of business losses unless represented in the income tax records as testified to by Roger Murphy, is irrelevant to the damages theory as presented by Murphy.

The heart of Murphy's lost past profits damages theory is that, absent the boycott, Murphy would have obtained a significant share of the large vessel and flat tow segment of the market. There was evidence that the marginal revenue generated in this segment of the market would have been greater than Murphy's historical marginal operating costs. The theory is that this added profit would have been sufficient to overcome the historical operating losses. The expert witness suggested three different strategies that Murphy might have pursued in the absence of the Red Stack boycott. In each case, the bench mark figure of new profits would have been reached only if Murphy achieved at least a share of approximately 14% of the large vessel and flat tow market segment.

Murphy contends that the 14% market share is conservative in the light of the fact that Murphy's share of the small vessel mar-

ket segment approximated 28%. Murphy argues that, absent the boycott, it is to be expected that it would enjoy the same share of the large vessel market segment as it enjoyed in the small vessel market segment. See Zenith, Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 118-19, 89 S.Ct. 1562, 1573-74, 23 L.Ed.2d 129 (1969). Murphy offered evidence that its capacity was sufficient to absorb this additional market share.

Other aspects of Murphy's theory, however, rely upon differences between the two separate market segments. We must examine these differences to determine whether the evidence presented was sufficient for the jury to make a just and reasonable inference that Murphy's market share success in the small vessel market segment could be projected into the large vessel and flat tow market segment. See Herman Schwabe, Inc. v. United Shoe Ma-

chinery Corp., 297 F.2d 906, 911 (2d Cir.), cert. denied, 369 U.S. 865, 82 S.Ct. 1031, 8 L.Ed.2d 85 (1962).

The most important difference, and the key to Murphy's relative success in the one market segment and its nearly complete foreclosure from the other, is that large vessel and flat tow shipwork requires, statistically, more tugs per job. In particular, it requires the availability of additional tugs in case difficulty is encountered. Because Red Stack had considerable excess capacity, under Murphy's own capacity calculations, Red Stack would almost always be in a position to provide all the tugs for those customers preferring to use the Red Stack equipment. Murphy would be called upon only where there was a preference to have at least one of Murphy's tugs instead of Red Stack's.

The large vessel and flat tow market segment typically requires multiple tugs per

job. Murphy's figures indicate that the average is 2.2 tugs per job. Thus, the per job preference for Murphy would have to be higher than its per tug market share. For example, for the period during which Murphy had only one large tug in operation, if all vessel jobs had required two tugs, then in order for Murphy to have a 28% per tug market share there would have to be a preference to use a Murphy tug, rather than all Red Stack tugs, for 56% of the jobs. Using Murphy's average figure of 2.2 tugs per job, and assuming preference for Murphy's equipment to be distributed evenly across jobs using different numbers of tugs, there would need to have been a preference of 61.6% in favor of the use of Murphy's large tugboat in order that Murphy should enjoy its 28% market share on a per tug basis. The corresponding figure in order for Murphy to enjoy the 14% market share that Murphy's expert testified would wipe

out the loss and produce a slight profit, is a 30.8% preference for the use of Murphy equipment on a per job basis. These preference figures would be somewhat lower if the preference for Murphy tugs were expressed disproportionately in the jobs requiring one or two tugs and less in the jobs requiring three or more tugs. Nonetheless, we can properly assume that for Murphy to obtain a given market share in the large vessel and flat tow market segment, it would require a greater preference for Murphy equipment than would the same market share in the small vessel market segment. This reduces the plausibility of a simple projection from the small vessel market to the large vessel market and increases the importance of the other evidence bearing on the question of the market share that Murphy could have been expected to achieve in the large vessel and flat tow market segment absent the boy-

cott. We next consider that evidence.

There was evidence that those responsible for ordering tugboats would have preferred that the Red Stack boycott policy not be in effect, and that the mixing of tugs from different companies be an available option when circumstances warranted it. There was, however, no evidence from which the jury could assess the relative preference of customers for obtaining all the tugboats for a given job from one company when that was easily possible. Because Red Stack could always, or nearly always, provide all the tugboats for any job, some evidence on the strength or weakness of preference for the simplicity of ordering and billing and the unproblematical liability relations of unmixed tug jobs was needed before a jury could reasonably project Murphy's market share in the market segment for which multiple tugs were common. Thus the jury was left without necessary evidence to deter-

mine the impact of boycottless choice by customers who may well consider other reasons for wanting to work with a single tug company on a particular job.

The expert witness's testimony as to Murphy's expected share in the large vessel and flat tow market segment depended upon an assumption that Red Stack would not cut its prices in reaction, even to a loss of over one-quarter of its prior share of this portion of the market. Murphy argued that Red Stack had never cut its prices, and that there was no reason to believe that it would have done so under the hypothetical circumstances. A reasonable jury could not, however, indulge in the assumption that a competitor would follow a course of behavior other than that which it believed would maximize its profits. See Knutson v. Daily Review, Inc., 548 F.2d 795, 812 (9th Cir. 1976), cert. denied, 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 (1977). Just

as there was no need for Murphy to prove that it would adopt a variant of the Red Stack grid price system and raise its prices if that would be in Murphy's economic best interest, so Red Stack need not introduce evidence to show that it would have reduced its prices if that would have increased its profitability by preserving a larger market share. In a hypothetical economic construction, such as the one underlying Murphy's theory on lost past profits, economic rationality must be assumed for all competitors, absent the strongest evidence of chronic irrationality. Otherwise it will be impossible to keep speculation in check.

Murphy contends that it enjoyed a relative cost advantage over Red Stack. Red Stack's higher labor costs, it argues, would have put a limit on Red Stack's ability to cut prices. It was not demonstrated, however, just where this limit was. The jury

was given no reason to believe that Red Stack could not have engaged in some price reductions in the large vessel and flat tow market segment. Indeed, Murphy argued that Red Stack's grid pricing system was so high in this segment of the market that it accounted for the extraordinary profitability of this segment as opposed to the small vessel segment. The charge for a Murphy tug plus a pilot was always less than half and at times as low as 41% of the Red Stack tug and pilot package. In the light of Red Stack's high charges in the large vessel and flat tow market segment, no jury could reasonably find that Red Stack could not significantly have cut its prices, in an attempt to protect its market share. Because this key assumption of Murphy's economic expert was left without evidential basis, the jury could only have been engaging in unguided speculation when it found that Murphy would have achieved a sufficient

market share to ensure a profitability that would have overcome its losses. Thus, there was on this element of damages insufficient "relevant data" for the jury to "make a just and reasonable estimate." Instead the verdict can only have been "based on speculation or guesswork." Bigelow v. RKO Radio Pictures, Inc., supra, 327 U.S., at 264, 66 S.Ct. 815, 90 L.Ed. 1040.[4]

B. Lost Future Profits

Murphy's damages theory with respect to lost future profits starts out where its theory on lost past profits concluded. It assumes that, absent the boycott, Murphy

[4] Because of our conclusion that Murphy's past lost profits theory was fatally deficient for the reasons discussed above, we need not consider whether the jury had sufficient evidence from which to conclude that Murphy would have had sufficient capacity to handle the increased market share in the large vessel and flat tow market segment to ensure profitability. The issue is whether additional evidence was needed to project the capacity from the small vessel market segment to the typically multiple tug situation of the large vessel and flat tow market.

would have been profitable because of its increased market share in the large vessel and flat tow market segment. Therefore, instead of going out of business in 1975, Murphy would have continued in business and would have made profits for at least the next five years. These profits were then calculated by projecting Murphy's actual historical revenue and multiplying that by Bay Cities' lowest rate of profit during the years of Murphy's existence. Because the jury could not reasonably have reached the first step of Murphy's argument, that absent the violation Murphy would have been a profitable enterprise, they could not reasonably have inferred that Murphy would remain in operation after 1975. Therefore, there is insufficient support in the record for the awarding of lost future profits. We need not reach the question whether Bay Cities, which did almost no work in the large vessel or flat two market

segment, and did barge towing of a sort that Murphy did not undertake, was a sufficiently similar enterprise to permit the use of its profit percentage in calculating Murphy's lost future profits.[5]

Thus, we conclude that the district judge was not in error when he granted the judgment n.o.v.[6]

AFFIRMED.

[5] Because we conclude that no relief may be granted, we need not reach the issues of the liability of Thomas B. Crowley and Crowley Maritime Corporation.

[6] Because it was not argued before the district court or timely raised on appeal, we do not decide whether an antitrust plaintiff who has established injury but proved no quantum of damages may be entitled to nominal damages and/or costs.

APPENDIX B

MURPHY TUGBOAT COMPANY
Plaintiff,

v.

SHIPOWNERS & MERCHANTS TOW-
BOAT CO., LTD. et al., Defendants.

SHIPOWNERS & MERCHANTS
TOWBOAT CO., LTD. et al.,
Counter-Claimants,

v.

MURPHY TUGBOAT COMPANY,
Counter-Defendant.

No. C-74-0189-WWS.

United States District Court,
N. D. California.

March 6, 1979.

MEMORANDUM OPINION AND ORDER ON MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND FOR NEW TRIAL

WILLIAM W SCHWARZER, DISTRICT Judge.

Plaintiff charges defendants with having violated Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1,2) and Section 17045 of the California Business and Professions Code.[1] After 28 days of trial and 5 days

[1] Section 17045 prohibits the making of secret payments to the injury of competitors

of deliberation, the jury returned a verdict awarding plaintiff damages aggregating $700,000. Defendants have moved for judgment notwithstanding the verdict or alternatively for a new trial.

I. The Factual Background

The relevant facts established at the trial may be summarized as follows. Defendants Shipowners & Merchants Towboat Co., Ltd. ("Red Stack") and Bay Cities Transportation Company ("Bay Cities") have for many years been engaged in ship assisting and ship towing on San Francisco Bay and its tributaries. Although until recently a small percentage of Red Stack's capital stock was held by outsiders, both

where such payments tend to destroy competition. Both plaintiff in its complaint and defendants in their counterclaim complained of violations. The jury declined to award damages to either party. Inasmuch as no party has taken exception to this part of the verdict, the Court will not consider this phase of the case.

companies have at all material times been substantially owned and controlled, directly or indirectly, by the Crowley family. Major decisions by the management of either company have required the approval of defendant Thomas B. Crowley, who was the principal officer of each of the companies. Beginning about 1973, Crowley Maritime Corporation ("Crowley Maritime") became the holding corporation of these companies and gradually undertook to provide various administrative services. So far as the record shows, however, it engaged in no operations and performed no acts relevant to the matters at issue.

Plaintiff Murphy Tugboat Company ("Murphy") entered the ship assist business on San Francisco Bay about October 1971 with a single tug. It remained in business, acquiring additional tugs, until September 1975 when ship assist operations were discontinued.

Ship assist work consists of providing tugs to aid vessels in docking or undocking. Vessels are docked or undocked in a variety of ways, depending on their size and configuration, tide and weather conditions, the qualifications of the master or pilot, and other circumstances. They may or may not employ an inland pilot to assist in docking or undocking, and they may choose to dock or undock without tugs or with the aid of one or more tugs.

In addition to assisting vessels in docking or undocking, tugs from time to time perform so-called flat tows, i.e., shifting vessels not under power between locations on the Bay.

Murphy entered the ship assist business about 18 months following the end of a six-months tug strike which had idled Red Stack and Bay Cities. During that strike, other companies had entered the ship assist business in the area, including Murphy Pacific

Marine Salvage Corporation, which had acquired the use of some seven tugs. Roger Murphy, who subsequently organized and largely owned plaintiff Murphy Tugboat Company, headed the ship assist operations for Murphy-Pacific, which was also engaged in the construction and salvage business. After defendants resumed their operations, Murphy-Pacific began to suffer substantial losses in its ship assist operations and ultimately agreed to sell its tugs to the Crowley interests in June 1971. There is evidence which, although disputed by defendants, would have permitted the jury to find that as a part of that transaction Murphy-Pacific agreed to stay out of the ship assist business.

For some years prior to Murphy's entry into the ship assist business, Red Stack and Bay Cities had a policy of refusing, except in emergencies, to provide service to a vessel which was also being assisted

by tugs of another company. Thus, if a vessel had arranged for ship assist services with another tugboat company, and more tugs were required for the job than that company could furnish, Red Stack and Bay Cities would decline to furnish the additional tugs to work with the tug of the other company. Defendants gave as a reason for the policy the hazards of divided responsibility in ship handling. Other Crowley controlled companies operating in Los Angeles harbor and Puget Sound, and other tugboat companies operating in New York harbor, did not adhere to such a policy.

During the period at issue, Red Stack and Bay Cities performed not less than 70 percent of the tug-assisted docking and undocking on San Francisco Bay (excluding military and other proprietary operations). The services of these companies were offered under two different tariffs. Bay

Cities, operating smaller tugs, served primarily smaller vessels (i.e., less than 14,000 net tons). It charged a flat rate per tug, plus overtime. Red Stack, operating larger, more powerful tugs, generally served the larger vessels. Its charges were computed under a grid tariff which took into account the size of the vessel and the length of the ship assist move and generally produced higher charges.

The thrust of Murphy's case at trial was that defendants' policy of refusing to work with competitors effectively excluded it from the large vessel segment of the ship assist market, where most of the demand for multi-tug jobs arose. There was evidence from which the jury could find that potential customers were deterred from hiring a Murphy tug by the knowledge that if the need for additional tugs arose during the operation, defendants would not provide them.

Murphy contended that but for defendants' exclusionary practice, its share of the large vessel market would have been equal to the 28 per cent share it held of the small vessel market. In that event, it would have been able either to raise its rates or increase its volume substantially, resulting in additional revenue which it claimed would have eliminated the operating losses plaintiff incurred between 1972 and 1976.

Murphy also charged that Red Stack had entered into an unlawful conspiracy with the Red Stack pilots' association to fix the fees collected by Red Stack masters for pilotage services rendered by them on Red Stack jobs. Red Stack had for many years offered pilot services along with ship assist services; it was able to do so because the masters of its tugs were licensed inland pilots, and its tugs had five men crews. When Red Stack tugs assisted a ves-

sel, the master of one of the tugs would, at the vessel's request, go on the bridge and serve as pilot. While Red Stack made no extra charge for this service, the master/pilot collected a fee from the vessel. The amount of that fee was set by agreement between Red Stack and the association. During the relevant time, the fee varied, depending on the specific job, but it was always considerably less than the fees charged by independent pilots. Murphy contended that the Red Stack pilots' agreement, by holding down the pilotage component of the package cost of using Red Stack's service, made it necessary for Murphy to hold down its tug charges so that the combined charge for the Murphy Tug-independent pilot package would remain competitive. As a result, Murphy claimed, it lost revenue which it would have realized had it been able either to raise its charges or to attract more jobs by reason of a greater price differential.

Murphy's damage proof consisted of evidence of its operating losses (reflected on its federal income tax returns) for the four fiscal years ended August 31, 1972, 1973, 1974 and 1975, as well as the loss suffered during fiscal 1976 following the shutdown of its operations. These losses totaled $490,936. In addition, Murphy computed its lost profits for the five succeeding years by applying to its average annual gross revenue of $435,928 the lowest net profit ratio experienced by Bay Cities during this period--8.2 percent. This resulted in a hypothetical annual profit of $35,756, or $178,730 for the five-year period. The total amount of damages claimed was $669,666. The jury awarded damages for violation of Section 2 aggregating $700,000, assessed as follows:

$160,000 against Red Stack,
80,000 against Bay Cities,
180,000 against Crowley Maritime Corp.,

and

180,000 against Thomas B. Crowley. In addition, the jury awarded $100,000 against Red Stack for violation of Section 1 by reason of the Red Stack pilots' agreement. No verdict was reached on the remaining conspiracy claims. (See Exhibit A, attached.)

II. The Standard of Review

Defendants' motion for judgment n.o.v. is governed by the same standards as a motion for directed verdict. The Court is bound to view the evidence in the light most favorable to the non-movant, drawing all permissible inferences in its favor. If, by that standard, there is substantial evidence to support a finding by a reasonable jury, the motion must be denied. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962); Autohaus Brugger, Inc. v. Saab Motors, Inc., 567 F.2d

901, 909 (9th Cir.), cert. denied, 436 U.S. 946, 98 S.Ct. 2848, 56 L.Ed.2d 787 (1978).

The foregoing standard is applicable to the issues on which the jury returned a verdict for plaintiff (monopolization, attempt to monopolize, the Red Stack pilots' agreement as a violation of Section 1, and damages). With respect to those issues on which the jury failed to reach agreement (other violations of Section 1 and conspiracy to monopolize), defendants' motion will be treated as one for a directed verdict governed by the same standard.

III. Monopolization and Attempt to Monopolize

A. Liability of Bay Cities and Red Stack

1. Monopolization

To establish the offense of monopolization, plaintiff must prove (1) possession of monopoly power in the relevant market and (2) the willful acquisition or main-

tenance of that power. United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). The relevant geographic market is the area of effective competition defined in terms of where buyers can turn for alternative sources of supply. Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1218 (9th Cir. 1977). The relevant product market consists of commodities or services reasonably interchangeable by consumers for the same purpose. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 76 S.Ct. 994, 100 L.Ed. 1264 (1956).

There is no serious dispute that the relevant geographic market must be confined to San Francisco Bay, and the record would permit no different finding. To bring tugboats into the Bay to perform particular jobs would be prohibitive in terms of both money and time. The boundaries of the Bay for this purpose may not

be clearly established--i.e., it may or may not be feasible, in view of the running time, to perform San Francisco-Oakland jobs with tugs based as far away as Benicia--but in view of defendants' overwhelming share of the ship assist business on the Bay, regardless how delineated, further refinement is unnecessary.

Defendants argue that the product (or service) market must include doing without commercial tug service, i.e., docking or undocking without tugs or with the use of inhouse tugs. The alternative of doing without is present in the market for virtually every product or service, except perhaps air or water. The readiness with which consumers will resort to the alternative is a function of the relationship of demand to supply, an element of every market. Thus, demand for a product or service may be more or less elastic, depending on circumstances. The degree of

elasticity, however, does not aid in defining the limits of the product or service market in terms of reasonable alternatives; it is more properly taken into account in determining the degree of monopoly power possessed by the supplier once the market has been defined.

Defendants also seek to include jobs performed by tugs operated by the Navy and by the Standard Oil Company. Inasmuch as these tugs during the relevant period served only vessels operated by the Navy and Standard Oil, respectively, and were not available to serve the public, they did not offer an alternative source of ship assist services. The market must therefore be limited to commercial ship assist jobs. See SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1063 (3rd Cir. 1978).

There was evidence from which the jury could find that defendants' share of the market based on revenue exceeded 80 percent.

In addition, according to defendants' own contemporary records, between 1971 and 1975 Bay Cities and Red Stack together performed over 70 percent of the commercial ship assist jobs, even if so-called no tug jobs are included. No competing firm ever performed more than 15 percent of the jobs. Given the size of defendants' market share, there was substantial evidence to sustain a finding that defendants together possessed the power to exclude competition or control prices,[2] and hence monopoly power in the relevant market.[3] See United States v.

[2] There was, in addition, evidence that the rates charged by defendants were treated as the going rate and were followed by others performing ship assist services on the Bay.

[3] Inasmuch as Bay Cities and Red Stack were commonly owned and controlled, their market shares may reasonably be aggregated for purposes of determining whether they possessed monopoly power. The fact that they chose to behave as separate firms competing with each other in the market (see Part V. A. infra) does not eliminate the existence of power derived from their combined market share by the person controlling their operations, regardless of whether it was exercised.

du Pont & Co., supra, 351 U.S. at 391, 76 S.Ct. 994; Greyhound Computer Corp., Inc. v. International Business Machines Corp., 559 F.2d 488, 496 (9th Cir. 1977), cert. denied, 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 790 (1978); United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2nd Cir. 1945).

Defendants presented evidence from which it could be found that the demand for their services was relatively elastic. Thus, during the 1969-1970 strike, many vessels were docked and undocked without the use of tugs. After the strike, however, the use of tugs was resumed; the decline in the number of tug jobs in the post-strike period may have been attributable as much to the decline in shipping accompanying the winddown of the Vietnam war as to vessels doing without tugs. Defendants also showed that bow thrusters, which improve vessel maneuverability and control, are be-

ing installed in increasing numbers, reducing the demand for tugs. All of this evidence could be considered by the jury but did not preclude a finding that defendants possessed the requisite monopoly power.

There remains the question whether defendants were guilty of willful acquisition or maintenance of that power. Defendants presented evidence reflecting the quality of their service and equipment and the large amount of goodwill gained by them over the years in support of the claim that, if defendants had monopoly power, it was the result of their superior service or business acumen. See United States v. Grinnell Corp., supra, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778.

There was, however, abundant evidence to warrant the jury's rejection of that contention. Among other things, that evidence showed that the Crowley companies acquired the tugs of Murphy-Pacific Marine Salvage

Corporation and a surplus tug put up for sale by Standard Oil Company although they considered this equipment inferior and had little if any use for it. There was evidence, albeit hotly disputed, that the purchase from Murphy-Pacific may have been accompanied by an agreement not to compete; certainly, the vigorous reaction of Crowley management to the appearance on the Bay of the Captain William, a 48-year-old, low-power tug which Roger Murphy had purchased shortly after the Murphy-Pacific sale, tends to confirm their expectation that no competition would appear from that quarter.[4]

The principal support for the jury's verdict is found in defendants' policy of refusing to work on ship assist jobs with the tugs of competitors except in emergencies.

[4] Lester Bedient, then president of Bay Cities, cabled Thomas Crowley, who was on vacation in Switzerland, to report this event and advise that he would contact the union about it.

Defendants contended that this policy was a reasonable measure to assure that jobs would be performed safely and competently and to minimize their exposure to claims and litigation. The jury was entitled to weigh against that justification the evidence that neither the Crowley-controlled tugboat operations in Los Angeles harbor and Puget Sound nor other tugboat companies in New York harbor followed such a policy. There was, moreover, evidence that the tendency of the policy was to deter vessel owners, agents, and pilots from using plaintiff's tugs. In this connection, the evidence showed that shipowners and agents, knowing that defendants would not work on a job with Murphy tugs, were deterred from hiring Murphy, particularly for larger vessels requiring more tugs or where, because of tide or wind conditions, the possibility existed that additional tugs might have to be called in to assist. Since Murphy never had more than

two large tugs in service, it lacked the capability to assure customers that its own equipment could meet whatever needs might arise in the course of the job.[5]

Defendants are, of course, under no legal duty to supply equipment to remedy plaintiff's deficiencies or to help it get jobs. Cf. Scanlan v. Anheuser-Busch, Inc., 388 F.2d 918, 920-21 (9th Cir.), cert. denied, 391 U.S. 916, 88 S.Ct. 1810, 20

[5] From August 1971 to May 1972, Murphy Tugboat had only one small tugboat on the Bay. From May 1972 to June 1973, it had one large tug, one small tug, and another small tug for several months. From June 1973 to September-October 1974, it had in service on the Bay two large tugs, a small tug, and another small tug for three months. From October 1974 to April 1975, it had only one large tug on the Bay. From April 1975 to September 1975, when operations ceased, the company had one large tug and one small tug.

Thus, for the four years of its operation, Murphy Tugboat had two large tugboats for only one and one-half years. For approximately two years, it had only one large tug. For one-half year, it had only a small tug. Murphy had four vessels on the Bay (two large tugs and two small tugs) for only three months in 1973.

L.Ed.2d 654 (1968). Nor are they precluded from adopting reasonable practices to protect themselves against liability for the acts of others. But the policy pursued by defendants, whatever its business justification, also had anti-competitive effects. As already noted, prospective customers were deterred from employing Murphy by the knowledge that defendants would not supply tugs to assist on a Murphy job if needed. It is one thing for defendants to attract the business of customers by reason of their superior capacity to supply whatever tugs may be needed for a job. It is quite another, however, to reinforce their dominant market position by a restrictive rule against working on jobs on which competitors are employed. Given their market position, defendants were "precluded from employing otherwise lawful practices that unnecessarily excluded competition." Greyhound Computer Corp. v. International Business

Machines, supra, 559 F.2d at 498.

This record amply supports the jury's verdict for plaintiff on the monopolization issue.

2. Attempt to Monopolize

An attempt to monopolize is established by proof that defendants, even if they failed to monopolize the market, nevertheless had a specific intent to monopolize and engaged in predatory conduct directed to accomplishing their unlawful purpose. Moore v. Jas. H. Matthews & Co., supra, 550 F.2d at 1219. Proof of specific intent can be supplied by inference drawn from proof of predatory or anticompetitive conduct which constitutes a restraint of trade. Gough v. Rossmoor Corp., 585 F.2d 381, 389-90 (9th Cir. 1978); Knutson v. Daily Review, Inc., 548 F.2d 795, 814-815 (9th Cir. 1976), cert. denied, 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 (1977).

The evidence of defendants' practice of

refusing to work on vessels with competitors, which the Court has found sufficient to support a finding of monopolization, coupled with the other evidence previously discussed raising an inference of intent to exclude competitors, is sufficient to support the verdict here. See Janich Bros. Inc. v. American Distilling Co., 570 F.2d 848, 854 n. 4 (9th Cir. 1977), cert. denied, ---U.S. ---, 99 S.Ct. 103, 58 L.Ed.2d 122 (1978).

B. Liability of Thomas B. Crowley and Crowley Maritime Corporation

1. Thomas B. Crowley

It is undisputed that Thomas B. Crowley was at all material times defendants' chief executive officer with authority to exercise control over their operations. The Ninth Circuit has said that "[t]he individuals through whom a corporation acts and who shape its intentions can be held liable on a charge of attempted monopolization." Tillamook Cheese & Dairy Association v. Tillamook

County Creamery Association, 358 F.2d 115, 118 (9th Cir. 1966). But neither the facts of that case nor the decisions cited in support of this proposition disclose under what circumstances an officer or a director may be held liable under the antitrust laws for his corporation's Section 2 violation.[6]

[6] Plaintiff's brief is of little assistance here. It relies primarily on Lorain Journal Co. v. United States, 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162 (1951), and Hartford-Empire Co. v. United States, 323 U.S. 386, 65 S.Ct. 373, 89 L.Ed. 322 (1945), both of which were government suits for injunctive relief and do not address the issue of liability for damages for past conduct. Plaintiff's contention that a treble damage judgment was subsequently rendered against both the corporate and individual defendants in the Lorain Journal litigation is apparently in error. See Elyria-Lorain Broadcasting Co. v. Lorain Journal Co., 298 F.2d 356, 357 (6th Cir. 1961) ("plaintiff radio station had begun a civil action for treble damages against the newspaper . . ."). In any event, there is no discussion whatever in the cited decisions of liability of officers or directors. Hartford-Empire, to the extent it has any bearing on the present issue, simply confirms the necessity of proof of participation by the individuals in acts constituting steps in the progress of the wrongful conduct. 323 U.S. at 407, 65 S.Ct. 373.

Basic principles of tort and agency law provide the starting point for defining those circumstances. An agent "who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal." Restatement (Second) of Agency § 343 (1957). Applied to corporations, this rule of agency law means that "[a]n officer or director is, in general, personally liable for all torts which he authorizes or directs or in which he participates, notwithstanding that he acted as an agent of the corporation and not on his own behalf." Ballantine, Corporations § 112 (rev. ed. 1946). Courts have, however, consistently stated that a corporate executive will not be held vicariously liable, merely by virtue of his office, for the torts of his corporation. Tillman v. Wheaton-Haven Recreation Association, 517 F.2d 1141, 1144 (4th Cir. 1975); Martin v.

Wood, 400 F.2d 310, 313 (3d Cir. 1968); Armour & Co. v. Celic, 294 F.2d 432, 439 (2d Cir. 1961). Personal liability must be founded upon specific acts by the individual director or officer. Tillman v. Wheaton-Haven Recreation Association, supra, 517 F.2d at 1144; Davis H. Elliot Co. v. Caribbean Utilities Co., 513 F.2d 1176, 1182 (6th Cir. 1975). The few antitrust decisions considering this issue have also underscored the need for participation in the tort by the executive. Higbie v. Kopy-Kat, Inc., 391 F.Supp. 808, 810 (E.D.Pa.1975); Deaktor v. Fox Grocery Co., 332 F.Supp. 536, 542 (W.D. Pa.1971), aff'd, 475 F.2d 1112 (3d Cir.), cert. denied, 414 U.S. 867, 94 S.Ct. 65, 38 L.Ed.2d 86 (1973); Bergjans Farm Dairy Co. v. Sanitary Milk Producers, 241 F.Supp. 476, 482 (E.D.Mo.1965), aff'd, 368 F.2d 679 (8th Cir. 1966).

Participation may be found not solely on the basis of direct action but may also con-

sist of knowing approval or ratification of unlawful acts. E. g., Donsco, Inc. v. Casper Corp., 587 F.2d 602 (3rd Cir. 1978) (corporate officer arranged for the use and copying of materials constituting unfair competition); Tillman v. Wheaton-Haven Recreation Association, supra, 517 F.2d 1141 (directors of the association promulgated and enforced a white-only membership policy); Solo Cup Co. v. Paper Machinery Corp., 359 F.2d 754 (7th Cir. 1966) (president of corporation, who arranged for the employment of plaintiff's former engineer and negotiated for the sale of machines in anticipation of the engineer's ability to duplicate plaintiff's machine, was liable to plaintiff for damages based on unfair competition); Barry v. Legler, 39 F.2d 297 (8th Cir. 1930) (officer had knowledge of misrepresentations made by agents under his control in connection with the sale of stock yet failed to act); McCrea v. McClenahan,

131 App. Div. 247, 115 N.Y.S. 720 (Sup.Ct. 1909) (president of corporation personally converted plaintiff's chattels).

Such approval or ratification must, however, be of acts or conduct which are inherently unlawful. See, e. g., Lobato v. Pay Less Drug Stores, Inc., 261 F.2d 406, 409 (10th Cir. 1958) (emphasis added), where the court stated:

> "Specific direction or sanction of, or active participation or cooperation in, a positively wrongful act of commission or omission which operates to the injury or prejudice of the complaining party is necessary to generate individual liability in damages of an officer or agent of a corporation for the tort of the corporation."

The principle is reflected in Section 2343 of the California Civil Code, which provides:

> "AGENT'S RESPONSIBILITY TO THIRD PERSONS.

One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others:

"1. When, with his consent, credit is given to him personally in a transaction;

"2. When he enters into a written contract in the name of his principal, without believing, in good faith, that he has authority to do so; or

"3. When his acts are wrongful in their nature." (emphasis added)

The application of this principle to cases in which Sherman Act liability is sought to be imposed for past conduct is supported by sound reasons, most recently explicated by the Supreme Court in United States v. United States Gypsum Co., 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978). Although that case involved the imposition of criminal liability under the antitrust laws, the

underlying policy considerations have a bearing as well on the civil liability of officers for corporate violations. After noting that "judicial elaboration of the Act [has not] always yielded the clear and definitive rules of conduct which the statute omits" and that "the behavior proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct," id. at 438, 440, 98 S.Ct. at 2874, 2875, the Court stated:

> "[W]here the conduct proscribed is difficult to distinguish from conduct permitted and indeed encouraged, as in the antitrust context, the excessive caution spawned by a regime of strict liability will not necessary [sic, necessarily] redound to the public's benefit. The antitrust laws differ in this regard from, for example, laws designed to insure that adulterated food will not be

sold to consumers. In the latter situation, excessive caution on the part of the producers is entirely consistent with the legislative purpose." Id. at 442, 98 S.Ct. at 2876 n. 17.

The generality of the Act's prohibition, the often uncertain line between proper and improper conduct, and the social interest in not deterring economically useful conduct by the imposition of excessive risks--all of which the Supreme Court recognized in United States Gypsum--make it appropriate to limit personal liability to cases of participation in inherently wrongful conduct.[7] The only

[7] That statement is not intended to suggest that proof of unlawful intent is necessary to impose civil liability on officers. Although that argument has been advanced by some commentators, see Whiting, Antitrust and the Corporate Executive (pt. 1), 47 Va.L.Rev. 1938 (1965), Note, The Antitrust Laws and the Corporate Executive's Civil Damage Liability, 18 Vand.L.Rev. 1938 (1965), there is no warrant in the authorities previously discussed to impose a requirement which would in effect equate the standard of proof for civil and criminal liability.

reported cases involving the imposition of personal liability appear to be consistent. See Bergjans Farm Dairy Co. v. Sanitary Milk Producers, supra, 241 F.Supp. 476 (individual corporate officers of the dominant dairy firm in the market held liable for violation of Sections 1 and 2 where they knowingly participated in or approved a course of conduct which included predatory price reductions, payment and false reporting of secret rebates, pressuring customers to accept exclusive supply contracts and buying out those who would not cooperate); Kentucky-Tennessee Light & Power Co. v. Nashville Coal Co., 37 F.Supp. 728 (W.D.Ky.1941), aff'd, 136 F.2d 12 (6th Cir. 1943) (affirming denial of motion to dismiss charges of violation of Robinson-Patman Act against officer who accepted bribes from coal company to induce him to cause his corporation to make coal purchases).

The evidence of Thomas Crowley's conduct does not sustain a finding of participation in inherently wrongful conduct. His direct participation was limited to the purchase of the Murphy Pacific tugs which, even if coupled with a non-competition covenant, was not inherently wrongful. Cf. California Business & Professions Code § 16601; Monogram Industries, Inc. v. Sar Industries, Inc., 64 Cal.App.3d 692, 134 Cal. Rptr. 714 (1976). While he must be assumed, as chief executive officer, knowingly to have approved or ratified the policy of refusing to work vessels with competitors, that policy also cannot be said to be inherently wrongful. It violates no per se prohibition (see p. 861 infra), is supported by legitimate business considerations, and is simply evidence of monopolization or an attempt to monopolize when viewed in the light of all the surrounding facts and circumstances. In the absence of evidence of knowing approval of

inherently wrongful acts. Thomas Crowley cannot be held personally liable for the corporate defendants' violation of Section 2. He is therefore entitled to judgment.

2. Crowley Maritime Corporation

Crowley Maritime became the holding company of Bay Cities and Red Stack sometime after 1973. It owned substantially all of their stock and shared common officers and directors with them. Its activities were substantially limited to providing computer and other corporate support services having no bearing on the matters in issue. There is no evidence that it engaged in any operations, let alone that it participated in any possibly unlawful practice or conduct.

Crowley Maritime can therefore not be held liable for having participated directly in the antitrust violations. If liability is to be imposed, it would have to be on the theory that Crowley Maritime is responsible for the acts of its subsidiaries.

But a parent corporation is not liable for its subsidiaries' acts simply because the parent owns all the stock of the subsidiaries and shares common officers and directors. Steven v. Roscoe Turner Aeronautical Corp., 324 F.2d 157, 161 (7th Cir. 1963); Spears v. Transcontinental Bus System, 226 F.2d 94, 98 (9th Cir. 1955), cert. denied, 350 U.S. 950, 76 S.Ct. 326, 100 L.Ed. 828 (1956); Annot., 7 A.L.R.3d 1343, 1350-51 (1966). The evidence would have to show that the subsidiary was a mere instrumentality of the parent, indicated by such facts as inadequate capitalization, absence of independent activity, action in the interest of the parent rather than the subsidiary, and failure to observe the legal requirements of separate corporate existence. Steven v. Roscoe Turner Aeronautical Corp., supra, 324 F.2d at 161; annot., 7 A.L.R.3d 1343, supra, at 1354-55. None of those factors is present here. On the contrary, Bay Cities and Red

Stack were held out to be and acted as separate and independent operational and economic entities. (See Part V. A. infra.)

Crowley Maritime is therefore entitled to judgment.

IV. The Red Stack Pilots' Agreement

A. Capacity fo Conspire

The jury found the agreement between Red Stack and the pilots' association to be an agreement in unreasonable restraint of trade, presumably on the theory that it operated to fix the fees charged by Red Stack masters for performing pilot services. Assuming plaintiff to have standing under Section 4 of the Clayton Act,[8] the thres-

[8] Whether plaintiff, as a competitor of defendant Red Stack, has standing under the antitrust laws to attack an agreement between Red Stack and an association of its employees which has a tendency to place a ceiling on the price charged by Red Stack for the package of services it offers in competition with plaintiff is a matter not free from doubt. While plaintiff and defendants were engaged in the same "area of the economy," it does not follow that injury caused plaintiff by reason of a com-

hold question is whether the agreement falls within the ambit of Section 1.

The undisputed evidence establishes that an informal association of Red Stack masters was formed in 1946. The masters had been performing pilotage services for Red Stack customers for many years but had not received extra compensation for this service.

petitive advantage gained by defendants through an agreement controlling a component of the total price of their service is injury "by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15; In re Multidistrict Vehicle Air Pollution MDL No. 31, 481 F.2d 122, 125-29 (9th Cir.), cert. denied, 414 U.S. 1045 (1973); see also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 487-89, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). Plaintiff has cited no cases supporting recovery under Section 4 of the Clayton Act based on conduct by a competitor enabling him to price below plaintiff, and a court should be loath to entertain attacks on arrangements (not shown to have exclusionary effects) between persons who are not competitors the purpose of which is to lower the cost of goods or services to consumers. See generally Murphy Tugboat Co. v. Crowley, 454 F.Supp. 847 (N.D.Cal.1978). In view of the disposition of this branch of the case, however, it is unnecessary to untangle this particular web; the court will therefore assume without deciding that plaintiff has standing.

About 1946, the Masters, Mates and Pilots Union, representing these masters, asked that they be permitted to charge a fee for providing this service. Red Stack agreed to a then pilotage fee of $5 or $10, depending on the move, to be paid by the vessel requesting the service, and it was in conjunction with this agreement that the association was formed.

The association collects the fees and disburses the proceeds. There is no evidence that it performs any significant additional functions other than to negotiate with Red Stack concerning the level of the fee to be charged.

"Antitrust law is concerned with the concerted action of distinct economic entities." Knutson v. Daily Review, Inc., supra, 548 F.2d at 802. Agreements must be judged in the light of the purpose of the antitrust laws to prevent restraints on competitive economic behavior. Because an agreement

between a corporation and its employees does not restrain competition, it cannot form the basis for a conspiracy claim under Section 1 of the Sherman Act. Chapman v. Rudd Paint & Varnish Co., 409 F.2d 635, 643 n. 9 (9th Cir. 1969); Morton Buildings of Nebraska, Inc. v. Morton Buildings, Inc., 531 F.2d 910, 917 (8th Cir. 1976); Nelson Radio & Supply Co., Inc. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952), cert. denied, 345 U.S. 925, 73 S.Ct. 783, 97 L.Ed. 1356 (1953). The agreement at issue here--which is the raison d'etre of the association--is one between a group of employees and their common employer concerning the amount of extra compensation they may collect from their employer's customers for rendering extra service to them during their regular working hours. It imposes no restraint on competitive or other independent economic activity of the association (which has no such purpose or function)[9] or its members. It must therefore

be considered as being outside the ambit of Section 1.[10]

B. Application of the Labor Exemption

The jury found that the agreement between Red Stack and the Red Stack pilots was not intimately related to the wages or

[9] While plaintiff has at times contended that the Red Stack pilots' agreement somehow ran afoul of the prohibition against tying, there is no evidence whatever to support such an argument. Nothing in the record suggests that Red Stack required or even requested that its customers also use Red Stack masters as pilots; vessels were entirely free to use the (more expensive) services of independent pilots. Nor were Red Stack pilots precluded from rendering services outside working hours on whatever terms they might negotiate.

[10] Suppose the Red Stack pilots' agreement had simply prohibited the Red Stack pilots from charging for pilotage service performed while engaged in their duties as Red Stack employees. The result would have been to increase the price differential between the two packages to plaintiff's disadvantage. But could plaintiff complain of a rule imposed by an employer prohibiting his employees from collecting fees for themselves from his customers? Such an apparently reasonable restriction on one's employees would not seem to be an antitrust violation. If that is true, it is difficult to see how a more limited understanding with one's employees having a lesser impact on competitors could be found to be unlawful.

working conditions of the members of the association as Red Stack employees and therefore not exempt.

The members of the association, all of whom were masters on Red Stack tugs, were employees of Red Stack. Their services as pilots were performed during the time when they were employed by Red Stack and the Red Stack tugs on which they worked were performing ship assist services on behalf of Red Stack for Red Stack customers. None of the services subject to the agreement was performed by the masters independently of their employment by Red Stack.

In Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689, 85 S.Ct. 1596, 1602, 14 L.Ed.2d 640 (1965), the Supreme Court held that the labor exemption of the Sherman Act (15 U.S.C. § 17) applies to agreements and restrictions which "like wages, and unlike prices, [are] . . . intimately related to wages, hours and working

conditions." In that case, the question involved a union demand that sales of meat by all markets be restricted to the hours of 9 a.m. to 6 p.m. The Court held that "the particular hours of the day . . . during which employees shall be required to work are subjects well within the realm of 'wages, hours, and other terms and conditions of employment' about which employers and unions must bargain." 381 U.S. at 691, 85 S.Ct. at 1602. It then went on to say:

> "And, although the effect on competition is apparent and real, perhaps more so than in the case of the wage agreement, the concern of union members is immediate and direct." Id.

Given that test, it is immaterial that, as plaintiff contends, the services performed by the masters as pilots may technically have been outside the scope of their employment.[11] The level of pilotage fees (whatever their effect on competition

between Red Stack and independent pilots

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Plaintiff points to a clause in the agreement stating that Red Stack shall not be liable for the acts of its employees when they are serving as pilots. But this clause is merely an attempt by Red Stack to relieve itself from liability; it does not change the essential fact that the pilotage services are furnished in connection with and as a result of the masters' employment by Red Stack. Moreover, the cases cited by plaintiff, even if relevant, do not support its contention that the masters are not acting within the scope of their employment when they perform pilotage services. Bisso v. Inland Waterways Corp., 349 U.S. 85, 92-95, 75 S.Ct. 629, 99 L.Ed. 911 (1955); Sun Oil Co. v. Dalzell Towing Co., 287 U.S. 291, 294-95, 53 S.Ct. 135, 77 L.Ed. 311 (1932); United States v. SS President Van Buren, 490 F.2d 504-07 (9th Cir. 1973); and California v. S/T Norfolk, 435 F.Supp. 1039, 1046-47 (N.D.Cal.1977), state no more than that for purposes of determining a vessel's liability, a pilot is considered the employee of the vessel he is navigating, not of the tug. That conclusion does not imply that the pilot cannot at the same time be viewed as acting within the general scope of his employment for purposes of applying the labor exemption especially where, as here, his pilotage is a direct result of his employment by the tug. Finally, plaintiff argues that the pilots' fees are not included in the W-2 statements issued by Red Stack and that the union's collective bargaining agreement does not discuss the pilotage work. But this contention, like plaintiff's other theories, ignores the totality of the circumstances of the Red Stack pilots' working conditions which give rise to the piloting services.

and tugs) being received in connection with the masters' employment clearly had an effect on their total compensation and hence was a matter of "immediate and direct" concern for them. That concern is borne out by the genesis of the agreement, which was the demand of the masters for permission to charge fees. Given such a demand upon their employer Red Stack, some agreement on the subject between the employer and a representative of the masters was virtually inevitable. That the employee representative for this purpose is someone other than the regular collective bargaining representataive and that the subject of the agreement is compensation collected from a third party does not diminish the immediate and direct concern of these employees in this aspect of their compensation. See NLRB v. Harrah's Club, 403 F.2d 865, 873-75 (9th Cir. 1968); Mitchell v. Gibbons, 172 F.2d 970 (8th Cir. 1949). Nor is the labor exemption rendered

inapplicable by reason of any impact of the agreement on price. American Federation of Musicians v. Carroll, 391 U.S. 99, 88 S.Ct. 1562, 20 L.Ed.2d 460 (1968).

There is in this case the additional factor of the employer's legitimate concern that the activities of its employees while on the job, particularly the level of compensation collected by them from the employer's customers during the employees' working hours, should be regulated.

Under these circumstances, it must be concluded that the agreement is exempt as a matter of law.

C. Damages

The jury awarded plaintiff damages of $100,000 for injury caused by the Red Stack pilots' agreement.

The only damage evidence offered by plaintiff pertaining to this agreement consisted of Exhibit 608 and testimony by plaintiff's expert, Professor McFadden.

Exhibit 608 showed that on ships over 14,000 tons, the average Red Stack package cost (i.e., the tug charge plus the pilotage fee as fixed by the agreement) was at all times twice as high or higher than the average package cost of using plaintiff plus the more expensive independent pilot. Even on the smaller vessels, the average Red Stack package cost substantially exceeded the average Murphy package cost at all times.

Inasmuch as plaintiff could therefore not argue that the relative magnitude of pilotage fees placed it under a competitive disadvantage, its theory, as articulated by Professor McFadden, was that had Red Stack permitted its pilots to charge more, Murphy could have increased its tug charges by a similar amount, thus retaining the competitive price relationship while increasing its revenue. Alternatively, plaintiff could have maintained its charge and benefitted from the additional business attracted by

the greater price differential. (R.T.2405-06,2410-11)

The logic of that theory, such as it is, rests on the assumption that whatever disadvantage was suffered by plaintiff flowed from the relatively higher pilotage fee of the independent pilots, i.e., Murphy's percentage share of the total package charge was reduced in proportion to the higher share represented by the pilots' fee. The cause of any loss, therefore, would be the differential between the total cost of using Red Stack and the total cost of using plaintiff. But if the independent pilots chose to maintain a level of fees that compelled plaintiff to maintain lower rates to be competitive, the resulting loss of revenue is not attributable to the Red Stack pilots' agreement. Thus, plaintiff has failed to prove "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). See also Pacific Engineering & Production Co. of Nevada v. Kerr-McGee Corp., 551 F.2d 790 (10th Cir.), cert. denied, 434 U.S. 879, 98 S.Ct. 234, 54 L.Ed.2d 160 (1977); Murphy Tugboat Co. v. Crowley, 454 F.Supp. 847 (N.D.Cal.1978).

Moreover, plaintiff has failed to offer any evidence from which the jury could have made a reasonable estimate of the amount of profit lost as a result of the agreement. Plaintiff's damage claim here was based on the theory that had the Red Stack pilot fees been increased, resulting in a relative increase in the Red Stack package cost over the cost of using plaintiff's tugs, plaintiff would nave increased its revenue through higher rates or more jobs. That theory rests on a number of assumptions, none of which is supported by facts in the record, including the following: that in the absence of the

agreement, the Red Stack pilots' fees would have been significantly increased; that had they increased, the independent pilots would not have increased their fees and plaintiff would have been able to increase its ship assist charges above the level of Bay Cities' competitive charges without loss of business; and that if plaintiff had instead maintained its charges unchanged and diverted substantial business, defendants would not have lowered their charges to meet the competition.

In a nutshell, plaintiff's damage theory is premised on a general increase in the price level for ship assist services as a result of which it would have increased its net revenue, either by charging more or by handling a greater volume. It is purely hypothetical, based on assumptions regarding competitive behavior which are wholly unrealistic and without any evidentiary support. Cf. Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71,

85-88 (9th Cir. 1969), cert. denied, 396 U.S. 1062, 90 S.Ct. 752, 24 L.Ed.2d 755 (1970); see also Gray v. Shell Oil Co., 469 F.2d 742, 749 (9th Cir. 1972), cert. denied, 412 U.S. 943, 93 S.Ct. 2773, 37 L.Ed.2d 403 (1973) ("'By its own terms, Clayton Act recovery is available only where actual injury has been suffered.'").

But even if all of these objections were overcome, there is no evidence at all from which the jury could have derived the amount of $100,000 as a reasonable estimate of the resultant revenue loss. From all that appears in the record, that figure was simply picked out of the air.[12]

[12] Although plaintiff in its brief claims that "the damage calculation for the customer boycott policy and the RSPA Agreement are entirely separate and cumulative," that is not the way in which plaintiff's case was presented to the jury. In his summation, counsel for plaintiff did not ask the jury to award damages discretely caused by that agreement. Instead, he treated that agreement as a part of defendants' exclusionary practices which caused plaintiff to lose jobs and revenue, for which loss he asked for aggregate

For each of the foregoing separate and independent reasons, defendants are entitled to judgment on this claim.

V. The Conspiracy Charges Under Sections 1 and 2

A. Capacity to Conspire

The form of verdict submitted to the jury required it to find specifically whether defendants Red Stack, Bay Cities and Crowley Maritime, who had been charged with conspiracy in violation of both Sections 1 and 2, were legally capable of entering into such a conspiracy. The jury failed to reach a verdict on that issue and defendants have moved for judgment.[13]

damages of $669,666 (R.T. 4079-86, 4089-96) Inasmuch as the jury also awarded plaintiff damages for loss caused by defendants' exclusionary practices under Section 2, the instant award of $100,000 would in any case have to be struck as duplicative, requiring a new trial. Cf. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 348, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971).

[13] The conspiracy claim against Thomas

Bay Cities and Red Stack are corporations which for many years have been substantially owned and controlled by the Crowley family. At some time after 1973, Crowley Maritime, a corporation wholly owned and controlled by the Crowley family, became the holding company for Bay Cities and Red Stack. Thomas Crowley succeeded his father sometime in the 1940's as chief executive officer of the Crowley companies and acted in that capacity during the period in issue. Each of the companies had its own management, but Mr. Crowley had the final authority in decisions affecting rates, equipment purchases, labor matters and operations.

At all material times, Red Stack and Bay Cities followed a common policy of refusing, except in emergencies, to work a vessel to-

Crowley was previously dismissed on the ground that an officer is legally incapable of conspiring with the corporation by which he is employed. See Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., supra, 416 F.2d at 82-83. See also Part IV. A. supra.

gether with a competitor's tug. There is sufficient evidence to establish that the policy was discussed among the Crowley companies and was implemented by each in awareness of the fact that the other was doing the same.

Passing for the moment the question whether the Crowley policy constituted an unreasonable restraint of trade, the facts present a classic case of combination and conspiracy, unless the common ownership and control of the companies immunizes them against conspiracy liability.

The Supreme Court has repeatedly stated that common ownership and control of corporations will not insulate them against antitrust liability. E. g., United States v. Citizens & Southern National Bank, 422 U.S. 86, 116-17, 95 S.Ct. 2099, 45 L.Ed.2d 41 (1975); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141-42, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968); Timken

Roller Bearing Co. v. United States, 341 U.S. 593, 598, 71 S.Ct. 971, 95 L.Ed. 1199 (1951); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215, 71 S.Ct. 259, 95 L.Ed. 219 (1951); United States v. Yellow Cab Co., 332 U.S. 218, 227, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947). On the other hand, the mere fact that commonly owned and controlled companies follow common policies does not give rise to antitrust liability. As previously noted, "[a]ntitrust law is concerned with the concerted action of distinct economic entities." Knutson v. Daily Review, Inc., supra, 548 F.2d at 802. It is when commonly owned and controlled corporations conduct themselves as distinct economic entities in the market that they become subject to antitrust constraints against concerted action which inhibits that conduct. Id. at 802, n. 5 and cases cited. Cf. Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d 451 (9th Cir. 1979) (intra-corporate con-

spiracy held not to exist where the decision not to deal with plaintiff was made by a single person, who was the stock-holder, president, and chairman of the Board of the affiliated corporations, without participation of any other members of management of the corporations).

The evidence established that Bay Cities and Red Stack historically had separate managements, operated out of separate locations, conducted separate solicitation, used separate and different equipment, negotiated separate and different labor agreements, and charged under separate and different tariffs. As separate corporations, they had the benefits flowing from separate incorporation. They competed for the San Francisco Bay ship assist business, each offering services which differed somewhat in their cost and nature from those offered by the other.[14]

[14] Although there is evidence reflecting public awareness that both Bay Cities and

The question presented is whether corporations which are legally separate and conduct themselves as economically distinct entities in the market may escape antitrust liability for concerted action because authority for that action flows from the person exercising common control over both corporations. The Supreme Court's prior expressions seem to reject the existence of an across-the-board defense on that basis. (See cases cited at p. 858 supra.)

The "distinct economic entity" analysis leads to the conclusion that Section 1 reaches commonly owned firms to the extent that they act as ostensibly separate enterprises in the market. Where, as here, commonly-owned enterprises, enjoying the ben-

Red Stack were "Crowley companies," it is clear that customers dealt with each company separately and that, when it came to doing business with them, they were not regarded as being either unitary or interchangeable.

efits of separate incorporation, compete for business in the market by offering distinct and independent services, a combination or agreement between them to impose a restraining practice on the market will affect not only their competitive behavior but, in all likelihood, the competitive behavior of other firms. Thus, market behavior will be adversely affected, and the effect on the market is not diminished by reason of the firms' common ownership.

"The fact that these restraints occur in a setting described by the appellees as a vertically integrated enterprise does not necessarily remove the ban of the Sherman Act. The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise in-

dependent. Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed. The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form." United States v. Yellow Cab Co., supra, 332 U.S. at 227, 67 S.Ct. at 1565.

On the present record, therefore, it cannot be concluded that defendants as a matter of law lacked capacity to conspire.[15]

B. Sufficiency of the Evidence

The existence of legal capacity to con-

[15] The capacity issue was submitted by the Court to the jury, which apparently encountered great difficulty in dealing with it. On reflection, it seems to the Court to be more of a legal than factual issue (at least where, as here, none of the relevant facts are disputed) and hence more properly resolved by the Court, but there appear to be no reported decisions on this question.

spire does not, however, resolve the question whether a particular combination or agreement of commonly owned or controlled corporations subjects them to Section 1 liability. The Supreme Court has not yet defined the parameters of the so-called intra-corporate conspiracy doctrine. What the cases so far decided establish is that common ownership or control of corporations does not immunize conduct which would otherwise violate Section 1. But common ownership or control of corporations will inevitably bring about communications, understandings, and common actions among them in areas reached by Section 1 such as production, distribution, and price. Indiscriminate application of Section 1 to commonly owned or controlled corporations could therefore have absurd and counterproductive results, subjecting them to liability for "an automatically self-proving conspiracy" on account of activity necessarily arising out of or inherently connected with common

ownership or control. See Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., supra, 416 F.2d at 83-84; Willis and Pitofsky, Antitrust Consequenceas of Using Corporate Subsidiaries, 43 N.Y.U.L.Rev., 20, 29-30 (1968). The result would be the imposition of unreasonable and unwarranted risks and burdens on the routine and legitimate use of the corporate form, and "reduced economic efficiency and a less fluid market for transfer or financing of capital assets." Willis and Pitofsky, Antitrust Consequences, supra, 43 N.Y.U.L.Rev. at 28; see also Report of the Attorney General's National Committee to Study the Antitrust Laws 34 (1955).

Thus, commonly owned or controlled corporations may be held to be guilty of conspiracy under Section 1 only if the evidence shows their agreement or common action to lack a legitimate business purpose and to have an anticompetitive effect. See DuPont Glore Forgan Inc. v. American Telephone &

Telegraph Co., 437 F.Supp. 1104, 1115-16 (S.D.N.Y.1977), aff'd, 578 F.2d 1367 (2d Cir. 1978); Chastain v. American Telephone & Telegraph Co., 401 F.Supp. 151, 160 (D.D.C.1975). An agreement or common action arising out of or inherently connected with the common ownership or control of the corporations normally would serve a legitimate business purpose. See, e. g., Syracuse Broadcasting Corp. v. Newhouse, 319 F.2d 683, 687 (2d Cir. 1963) (internal redistribution of corporate profits). On the other hand, extraneous restraints producing anti-competitive effects imposed upon commonly owned or controlled corporations holding themselves out to be competitors in the market are evidence from which a jury may find a Section 1 violation.

Defendants' policy of refusing to work with competitors falls into the latter category. Such a policy was not an integral aspect or necessary concomitant of common own-

ership or control. And, as heretofore discussed, the evidence showed that the policy was discussed among members of management of the companies and approved by Mr. Crowley, and was sufficient to permit the jury to infer that each company pursued it with knowledge that it was a common policy of the Crowley companies and for the purpose of implementing it as such. Thus the evidence was sufficient to sustain a Section 1 verdict. Cf. Theatre Enterprises Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 541, 74 S.Ct. 257, 98 L.Ed. 273 (1954); Interstate Circuit, Inc. v. United States, 306 U.S. 208, 227, 59 S.Ct. 467, 83 L.Ed. 610 (1939).

Defendants' rates are a different matter. The evidence showed that the rates and tariffs of each company were subject to Mr. Crowley's approval. Crowley consulted with subordinates, and management discussed rates from time to time. Pricing of course is an

integral part of the operation of any enterprise and is a legitimate concern of those who own and control it. Nothing is added to the picture by the evidence offered by plaintiff of a single instance in which one of the companies, Bay Cities, circulated a preliminary tariff to Red Stack prior to its implementation. There was no evidence that Bay Cities and Red Stack combined to employ pricing in any anticompetitive fashion.[16]

[16] Before the trial began, plaintiff pursued the theory that defendants conspired to depress the prices they charged for their services, presumably for the purpose of preventing plaintiff from operating profitably. The Court rejected this theory as a basis for computing damages, reserving for the trial the question whether defendants' pricing might be evidence of conduct violating Section 1 or 2. Murphy Tugboat Co. v. Crowley, supra, 454 F.Supp. at 850. Plaintiff produced no evidence at the trial, however, from which a jury could find that defendants acted jointly to depress prices. The only evidence offered in this respect--reflecting a relative increase in the labor to revenue ratio maintained by Bay Cities and Red Stack from time to time--raised no inference of joint action to maintain depressed prices. Moreover, the substantive evidence disclosed that the prices charged by both Red Stack and Bay Cities, which differed from

C. Unreasonable Restraint of Trade

At the trial the Court rejected plaintiff's contention that defendants' conduct amounted to a per se violation. The policy of refusing to work with competitors did not amount to a boycott because there was no refusal to deal, concerted or otherwise. Cf. Klor's, Inc. v. Broadway Hale Stores, Inc., 359 U.S. 207, 212, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959). Nor is that policy equivalent to a tying arrangement because separate products or services were not involved. Cf. Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5-6, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958); L. Sullivan, Antitrust 434-40 (1977).

each other, exceeded average variable costs, exceeded the prices charged by plaintiff, and generally even produced a net profit. The Court therefore instructed the jury that these prices were lawful and could not be considered in arriving at a verdict for plaintiff under Section 1 or 2. The Court adheres to that view and further discussion of pricing under either Section 1 or 2 is therefore unnecessary. See Janich Bros. Inc. v. American Distilling Co., supra, 570 F.2d 848.

Finally, the price fixing charge was rejected for the reasons stated in the preceding section.

Defendants' joint conduct may, however, (for the reasons stated in Part III. A. 1, supra) be found to constitute a misuse of their dominant position in the market, tending to inhibit the free choice of customers seeking tugboat services. The effect of that conduct in tending to foreclose access of competitors to the market is somewhat analogous to that of exclusive dealing contracts imposed by the dominant firm in the market. Cf. Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 329, 81 S.Ct. 623, 5 L.Ed.2d 580 (1961). And from the point of view of economic efficiency, defendants' refusal to work policy artificially reenforces demand for their tugboat services, tending to lead to underutilization of the facilities of competitors.

These considerations, coupled with the

fact that the Crowley companies followed a refusal to work policy only in the market where they held a dominant position, would have permitted the jury to find a combination in unreasonable restraint of trade.

Defendants, therefore, are not entitled to judgment as a matter of law on the Section 1 claim. Inasmuch as the same conduct has heretofore been held to be sufficient to permit the jury to find a violation of Section 2, defendants are not entitled to judgment as a matter of law on the conspiracy to monopolize issue.

VI. Damages[17]

We come then to the question whether the

[17] As stated in note 16 supra, plaintiff's original theory of damages was premised on the existence of a conspiracy among defendants to depress the charges for ship assist services. Damages consisting of lost profits were sought on the theory that, but for defendants' conspiracy, their charges would have been higher, allowing plaintiff to increase its charges and thereby increase its revenue without additional expense. In a prior ruling, the Court rejected plaintiff's

jury's award of damages aggregating $600,000 for violations of Section 2 can stand.[18]

offer of proof based on this theory. Murphy Tugboat Co. v. Crowley, supra, 454 F.Supp. 847.

[18] For purposes of deciding the damage issue on the motion for judgment n.o.v., the Court will adopt plaintiff's interpretation of the verdict (Exh. A, attached) that the jury assessed $600,000 against defendants jointly and severally, and that the assessment of particular amounts to specific defendants was surplusage.

In the event the judgment were overturned on that issue, however, the verdict must properly be treated as imposing on each defendant liability for a specified amount of damages. The form of verdict specifically asked the jury to find and state separately the amount of damage caused by each defendant found to be liable. The terms of the verdict form cannot be ignored. Cf. Fed.R. Civ.P. 49(b) (in case of inconsistency between a general verdict and the jury's answers to special interrogatories, the latter control). The assessments of $180,000 each against Thomas Crowley and Crowley Maritime must then be set aside for the reasons stated in Part III. B., supra. There would remain assessments of $160,000 and $80,000 against Red Stack and Bay Cities, respectively. Inasmuch as each may be separately liable for monopolization and attempt to monopolize, the jury could properly find each to be responsible for a different amount of damage.

This holding does not conflict with the common law principle that a jury has no right

The Court has heretofore determined that, on the record before it, the jury was entitled to find that defendants' policy of refusing to work with competitors was unlawful and had an adverse impact on plaintiff. (See Part III. A. 1, supra.) Plaintiff correctly points out that once it established "with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of anticipated revenue . . . the jury will be

to apportion damages among joint tortfeasors, and that if it does, the total damage award will control and the attempted apportionment will be treated as surplusage. See Gates v. L.G. DeWitt, Inc., 528 F.2d 405, 413 (5th Cir. 1976) (applying state common law); Dauenhauer v. Sullivan, 215 Cal.App.2d 231, 30 Cal.Rptr. 71, 74 (1963); Annot., 46 A.L.R.3d 801, 830-35 (1972). In those cases, the jury acted on its own in deciding to apportion damages after first determining a lump sum damage award. Here, however, the jury acted in accordance with the Court's instruction that it first assess the damage caused by each defendant and then total these amounts. Plaintiff did not object to this form of verdict at the time of trial. It cannot now contend that the jury actually meant to award $600,000 jointly and severally against defendants.

permitted to 'make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.' Bigelow v. RKO Radio Pictures, Inc., [327 U.S. 251, 264, 66 S.Ct. 574, 580, 90 L.Ed. 652 (1946)]." Flintkote Co. v. Lysfjord, 246 F.2d 368, 392 (9th Cir.), cert. denied, 355 U.S. 835, 78 S.Ct. 54, 2 L.Ed.2d 46 (1957). Accord, Kapp v. National Football League, 586 F.2d 644 (9th Cir. 1978); Greyhound Computer Corp. v. International Business Machines, supra, 559 F.2d at 506; Knutson v. Daily Review, Inc., supra, 548 F.2d at 811-12. Defendants' argument that any resulting injury suffered by plaintiff was not cognizable under the antitrust laws must therefore be rejected.

The issue before the Court is whether plaintiff offered evidence sufficient to enable the jury to make such a just and reasonable estimate. That mathematical certainty is not required for proof of damages is of course well settled, Story Parchment

Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563-66, 51 S.Ct. 248, 75 L.Ed. 544 (1931), but that is not the issue here. As the Court observed in Story Parchment:

> "The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount." Id. at 562, 51 S.Ct. at 250 (emphasis added).

And in Bigelow v. RKO Radio Pictures, Inc., supra, 327 U.S. at 264, 66 S.Ct. at 579-80, the Court said that:

> "[I]n the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other

causes, that defendants' wrongful acts had caused damage to the plaintiffs. . . . [T]he jury could return a verdict for the plaintiffs, even though damages could not be measured with the exactness which would otherwise have been possible. . . . In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data . . .." (Emphasis added) See also Zenith Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

While a "plaintiff need not negative all possible alternative explanations for his decline in profits," Knutson v. Daily Review, Inc., supra, 548 F.2d at 811, there must be proof of some damage "flowing from the unlawful conspiracy." Zenith Radio Corp.

v. Hazeltine Research, Inc., supra, 395 U.S. at 114 n. 9, 89 S.Ct. 1562. Causation, while relevant in the first instance to proof of the fact of damages, has a bearing as well on the sufficiency of the proof of the amount of damage. Unless the amount sought to be recovered is shown to be "definitely attributable" to defendant's wrongful conduct, there is no basis for making a "just and reasonable estimate."[19]

[19] The cases cited by plaintiff confirm the necessity of proof sufficient to permit a reasonable inference that the loss or damage was attributable to acts of defendants. In Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684 (1927), where plaintiff, a distributor, complained of having been illegally cut off by defendant, its supplier, plaintiff's damage proof was based on a comparison with revenue it had received during the period prior to the cutoff. In Story Parchment Co. v. Paterson Parchment Paper Co., supra, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544, where plaintiff complained of predatory price cuts, the proof was based on comparison of the prices previously charged with the unlawfully cut prices, allowing the jury to compute damages based on the differential. In Bigelow v. RKO Radio Pictures, Inc., supra, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652, where

To meet the minimum requirement of proof in a market exclusion case in which lost profits are sought, plaintiff must normally produce evidence falling into one of the following categories:

(1) Comparison of plaintiff's performance before and after the wrongful conduct under otherwise similar conditions; Bigelow v. RKO Radio Pictures, Inc., supra, 327 U.S.

plaintiff complained of having been deprived of first run motion pictures, the proof was based on comparison with the profits received by defendants' comparable theatre and also with the earnings of plaintiff's theatre during a prior period when it had received some first runs. And in Zenith Radio Corp. v. Hazeltine Research, Inc., supra 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129, where plaintiff complained of having been excluded from the Canadian market for television sets and radios by an illegal patent pool, plaintiff's damage proof was based on its share in the comparable United States market and its ability to obtain the same share in Canada had its marketing not been impeded by defendant's conspiracy to deny it patent licenses. Id. at 116 n. 11, 123-25, 89 S.Ct. 1562. These decisions do not support plaintiff's contention that its operating losses constitute proof of the amount of damage attributable to defendants' wrongful conduct simply because that conduct precluded it from obtaining substantial additional business which it could have handled profitably.

251, 66 S.Ct. 574, 90 L.Ed. 652; Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 376-78, 47 S.Ct. 400, 71 L.Ed. 684 (1927); Pacific Coast Agricultural Export Association v. Sunkist Growers, Inc., 526 F.2d 1196, 1206-07 (9th Cir. 1975), cert. denied, 425 U.S. 959, 96 S.Ct. 1741, 48 L.Ed. 2d 204 (1976);

(2) Comparison of performance in restrained and unrestrained markets which are otherwise comparable; Zenith Radio Corp. v. Hazeltine Research, Inc., supra, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129; Bigelow v. RKO Radio Pictures, Inc., supra, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652; Richfield Oil Corp. v. Karseal Corp., 271 F.2d 709, 714-15 (9th Cir. 1959), cert. denied, 361 U.S. 961, 80 S.Ct. 590, 4 L.Ed.2d 543 (1960); or

(3) Loss of specific business or customers; Herman Schwabe, Inc. v. United Shoe Machinery Corp., 297 F.2d 906, 913 (2nd

Cir.), cert. denied, 369 U.S. 865, 82 S.Ct. 1131, 8 L.Ed.2d 85 (1962).

Plaintiff offered no "before and after" evidence, nor did it offer evidence of loss of particular sales. Instead, it relied on damage theories which are discussed in the following sections.[20]

A. Lost Past Profits

Plaintiff contends that had it not been for defendants' refusal to work policy it would have had the same share of jobs on vessels over 14,000 tons as it had of jobs

[20] Plaintiff's damage theories have undergone several metamorphoses and no useful purpose would be served by recapitulating their evolution. At oral argument on these motions, the Court expressed its concerns on the damage issue and invited counsel to submit further memoranda setting out the theory and the substance of the supporting evidence. The following discussion then addresses plaintiff's position as most recently taken in its post-argument memorandum.

Regrettably, plaintiff chose not to respond to the Court's specific request at oral argument to address in its memorandum its theory of damages under the Red Stack pilots' agreement. The Court in this opinion has therefore had to rely on the arguments and theories previously urged by plaintiff on this aspect of the case.

on vessels of less than 14,000 tons. It handled 28 percent of the small vessel jobs but only 2 percent of the large vessel jobs. (Exh. 606) Thus, its volume of work on large vessels would have substantially increased.

Next plaintiff contends that it would have adopted a Red Stack-type grid tariff under which charges would have increased with the size of the vessel, but at a level of approximately 80 percent of the corresponding Red Stack charge.

Finally, relying on testimony of its economist Professor McFadden, plaintiff contends that given the additional volume at the higher rates, it would have realized net profits on the business which would have eliminated its operating losses and caused it to break even.[21]

[21] In his closing argument to the jury, plaintiff's counsel put it as follows:

"Now what kind of losses did we have? These losses on this chart are the losses

The threshold problem with this damage theory is the assumption that plaintiff's operating losses incurred in serving the small vessel segment of the market represent the amount of damage attributable to exclusion from the large vessel segment. Even assuming that plaintiff would have realized a net profit from working large vessels, the amount of that profit is not a function of the amount of loss suffered working small vessels. That loss logically cannot be said to be attributable to anything other than the small vessel operation. Tne fact that plaintiff might have realized from large vessel jobs profits to compensate

> from all operations for four years. And this is from Mr. Murphy's testimony, when he referred to his income tax returns, and this is the figure: $306,217. Those were our actual losses. And those are the losses that Professor McFadden testified that had we been operating in a competitive market where we had not been excluded, where we had free access to the big ships and the flat tows, those are the losses we would not have had." (R.T. 4093).

for the losses incurred on small vessel jobs does not make the latter a measure of the former.

The mere fact that defendants' conduct had an adverse impact on plaintiff's business and that this business showed a loss does not provide a basis for equating that loss with the amount of damage caused by defendants. Plaintiff must prove--albeit not with mathematical certainty--"injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra, 429 U.S. at 489, 97 S.Ct. at 697. Professor McFadden's opinion, unsupported by facts, that but for defendants' conduct plaintiff would not have suffered losses does not convert the evidence of operating losses into evidence of damage flowing from defendants' antitrust violations. See Autowest, Inc. v. Peugeot, Inc., 434 F.2d 556, 566 (2nd Cir. 1970);

Berkey Photo, Inc. v. Eastman Kodak Co.,[22]
457 F.Supp. 404, 420-21 (S.D.N.Y.1978).

22 Such evidence as there was refuted, rather than supported, the claim that plaintiff's tax losses provided a basis for a just and reasonable estimate of its antitrust losses. The evidence showed, for example, that plaintiff operated at a profit during its first year, when defendants' practices were the same as later, but that this profit was converted to a loss in subsequent years when plaintiff (1) increased officers' salaries substantially, e. g., Murphy's own salary went from $11,000 in 1971 to a high of $61,000 in 1975, at a time when operating results were the lowest (R.T. 640-42, 3451, 3511-12); (2) paid $9700 for a speedboat which produced only $600 of revenue and was used mainly for Mr. Murphy's pleasure (R.T. 770-73); (3) acquired an underpowered tug, the San Clemente, which, according to an application for a Small Business Administration loan, was "a terrific drain on the company," (R.T. 786, Exh. G3); and (4) paid $1000 for a coffee table which Mr. Murphy used in his home (R.T. 775-76; Exh. V). Finally, defendants' accountant showed that plaintiff incurred a two-year loss of $28,100 in its ship assist operations in Sacramento, where defendants did not operate and their practices therefore had no effect (R.T. 3440, 3460). Mr. Murphy's less detailed calculations showed that the Sacramento operation earned $4100 during these two years (R.T. 3869), but his testimony suggested that it suffered a loss instead. While these would normally of course be matters for the jury to weigh, they are relevant to the legal issue whether the proof offered of operating losses could qualify as the basis for a just

Even if we were to put aside this fatal defect, there are other flaws in the damage theory which are so obvious and substantial as to render it pure speculation.

First, the assumption that plaintiff would have acquired something on the order of a 28 percent share of the large vessel segment of the market, when all it ever had was a two percent share, is totally without evidentiary support. The evidence showed that there are substantial differences between docking and undocking small and large vessels. Docking large vessels is more hazardous and difficult, involves greater risks, and generally requires more, and more powerful, tugs. (R.T. 514, 523, 567, 893-94, 1348, 2222.) Moreover, plaintiff's participation in this work was necessarily premised on its working jointly with Red Stack on particular vessels. Although a number of witnesses testified in

and reasonable estimate of damages by the jury.

favor of having the option of calling on both Murphy and Red Stack, the evidence also indicated that some pilots and vessel operators prefer to avoid the risks of divided responsibility and liability. Thus, plaintiff's straight extrapolation from its share of small vessel jobs to project its share of large vessel jobs is too speculative to be accepted. Moreover, the possibility that plaintiff, operating most of the time with only one large tug,[23] could with Red Stack's help have captured more than one-fourth of the large vessel market from Red Stack, operating eight large tugs, is too remote and speculative to permit the jury to consider it as a basis for damages.[24]

[23] See note 5 supra.

[24] A further difficulty with extrapolation from plaintiff's 28 percent share of the small vessel jobs is that this share resulted in part from plaintiff's exclusion from the large vessel jobs. Defendants' practice inevitably forced plaintiff to concentrate on small vessels, leading to a penetration of

that market segment greater than it would have been had plaintiff spread its limited resources over both small and large vessel jobs. Thus, plaintiff, by relying on the 28 percent figure, is in a sense seeking to profit from defendants' wrong, something it should not be permitted to do. Eastman Kodak Co. v. Southern Photo Materials Co., supra, 273 U.S. at 378, 47 S.Ct. 400.

A related difficulty concerns the effect on plaintiff's share of small vessel jobs had it acquired the 28 percent share of large vessel jobs. Plaintiff's position on this question has vacillated. This of course is not a case where plaintiff had a proven capacity to handle additional volumes of business. Nor is this a case where plaintiff proposed to acquire additional equipment, intending instead to rely on the availability of defendants' equipment to augment its own capacity.

Professor McFadden's prediction in this regard that plaintiff could have greatly expanded its volume with its existing fleet of tugs (see note 5 supra) depended on his assumption that each of plaintiff's tugs had a capacity of 2.9 jobs per day, and that plaintiff had not been working at its full capacity. (R.T. 2257-62) However, this capacity figure is speculative and is based only on Mr. Murphy's observation that during a five-month period, one of his tugs, the Go Getter, averaged 2.9 jobs per day. (R.T. 2104-05) There are serious problems with plaintiff's approach of taking the total number of jobs done, dividing by the number of work-days, and then assuming that this is the capacity of each tug for purposes of calculating damages: Red Stack did not operate at this 2.9 figure, although there is no reason to assume it was less efficient than Murphy; the 2.9 figure does not take into account the need to have standby capacity to handle periods of peak demand; and it is speculative to

Second, the assumption that plaintiff would have published a grid tariff with a different and substantially higher rate structure is purely hypothetical. There is no evidence that plaintiff was precluded from publishing such a tariff while it was in business. And certainly the assumption that plaintiff could have maintained a level of rates 20 percent below Red Stack's while taking away, on the strength of Red Stack's cooperation, a large share of Red Stack's business defies reason.

Third, plaintiff's conclusion that with 28 percent of the large vessel segment serviced at 80 percent of the Red Stack rates it would have generated a profit equal to the amount it lost while servicing the small vessel segment is pure speculation. Even accepting the contention that plaintiff

assume that each Murphy tug, no matter what size or in what condition, would have the same capacity as the Go Getter, a large tug which alone operated continuously for 3 1/2 years. (R.T. 2467-85, 2509-14)

could have performed additional jobs on which its revenue would have exceeded its costs, there are no computations in the record to support the particular numbers which plaintiff placed before the jury and the jury accepted.

It may well be that defendants' policy caused plaintiff to lose some jobs which it otherwise might have handled. But from all the record discloses, plaintiff made no effort to offer evidence reflecting the impact of defendants' policy on its business. Presumably, that approach would have generated figures far more modest than those placed before the jury. That fact, however, does not justify permitting the jury to base a verdict on theories and assertions that are wholly speculative and without evidentiary support.

B. Lost Future Profits

Plaintiff also sought damages for the loss of future profits based on its prior years'

revenues. In closing argument, plaintiff's counsel stated the theory of recovery to the jury as follows:

> "Now how do we figure out what would have happened to us in the future? I think it is a pretty simple matter. We would stay in business. We would continue to operate, and operate profitably. The only question is: how profitably?
>
> "We think that it is reasonable for you to conclude that we would have operated on about the same, at least as well as Bay Cities did in its worst year of this three-year period, the least of the Bay Cities and Red Stack performance for the entire three-year period, and that is that we would have earned something in the vicinity of 82% [sic, 8.2%] of our revenue as profit. That is what they earned. That is what can be earned in this business. There is no reason why we could not earn it.

"So the calculation is thus: The first thing that you have to do is you have to figure what would our revenue have been. We have assumed for the purpose of this future analysis that our revenue would have been our same annual revenue that we had for the four years that we operated. And our annual revenue at that time was $435,000; $435,928. And if you take 8.2 percent of that, you get $35,746. That's annually.

"We think that it is reasonable for you to conclude that if we had been in business five years beyond the date that we got driven out, and to give us credit after this year, after we had this going-out-of-business loss, beyond that year, for the years '77, '78, '79, '80, and '81, a five-year period, that's $178,730.

"So I submit to you that our total losses are $178,730 for the future profits, and for the lost profits, $490,936,

or total losses in this amount: $669,666." (R.T. 4095-96)

There is no evidence to support the assertion that plaintiff could have earned a profit of 8.2 percent of gross revenue or that this would have been its profit rate in the absence of defendants' conduct. Even assuming that Bay Cities' operation was in certain respects comparable, the fact that Bay Cities was able to operate profitably in the small vessel segment of the market and plaintiff (after the first year) was not, renders any reference to Bay Cities' profit rate entirely inappropriate.[25] Plaintiff's claim for fu-

[25] Bay Cities' financial statements, from which plaintiff derived the 8.2 percent figure, were received into the record in connection with plaintiff's sales below cost claim. There was no suggestion when they were offered that they would be used as a basis for making a comparison to support the claim for future profits, advanced for the first time in closing argument. This use, without adequate foundation that Bay Cities' business was comparable to plaintiff's, would in any event require granting a new trial on damages.

ture profits must be rejected as wholly speculative. See Lessig v. Tidewater Oil Co., 327 F.2d 459, 473-74 (9th Cir.), cert. denied, 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1046 (1964).

The Court is therefore compelled to conclude that the damage verdict is too speculative to stand. See Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., supra, 416 F.2d at 88; Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 390-93 (6th Cir. 1962), cert. denied, 372 U.S. 907, 83 S.Ct. 721, 9 L.Ed.2d 717 (1963). The words of the Ninth Circuit are appropriate here:

> "The verdict of a jury should not lightly be set aside--certainly not for the mere reason that a court may disagree with it. However, in this case we are convinced that this verdict for the plaintiff, if allowed to stand, would be a legally unjustified windfall to the plain-

tiff and a miscarriage of justice."

Autohaus Brugger, Inc. v. Saab Motors, Inc., supra, 567 F.2d at 915.[26]

VII. Motion For New Trial

The court may grant defendants' motion for a new trial conditionally, even if the verdict is supported by substantial evidence, if the verdict is contrary to the clear weight of the evidence or results in a miscarriage of justice. Hanson v. Shell Oil Co., 541 F.2d 1352, 1359 (9th Cir. 1976),

[26] The confusion engendered in the jury's mind by plaintiff's "damage proof" is confirmed by the verdict. In the closing argument counsel for plaintiff stated that "our total losses are . . . in this amount, $669,666," and went on:

> "And that is what we firmly feel that these defendants damaged Murphy Tug, in that amount. And that is what we ask you to award as your verdit." (R.T. 4096)

With no other relevant evidence before it, the jury awarded an aggregate of $700,000, assessing different amounts for which there is no apparent basis against Bay Cities, Red Stack, Crowley Maritime and Thomas B. Crowley on the Section 2 claim and Red Stack on the Red Stack pilots' agreement claim.

cert. denied, 429 U.S. 1074, 97 S.Ct. 813, 50 L.Ed.2d 792 (1977). In this case, defendants' motion for a new trial must be granted, conditioned on reversal of the judgment, in the following respects:

A. Damages Under Section 2

For the reasons discussed in Parts IV. C. and VI, supra, the damage award is not supported by substantial evidence and is in any event excessive and against the clear weight of the evidence. A new trial, limited to the issue of damages, must therefore be granted. Hanson v. Shell Oil Co., supra, 541 F.2d at 1360; Minthorne v. Seeburg Corp., 397 F.2d 237, 244 (9th Cir. 1968).

B. Liability of Thomas B. Crowley and Crowley Maritime Corporation

For the reasons discussed in Parts III. B. 1 and 2, supra, the verdicts against Thomas Crowley and Crowley Maritime must be set aside as being against the clear weight of the evidence. There was no evidence permit-

ting the jury to find either a sufficient degree of active participation or wrongful conduct or a sufficient causal connection with damage suffered by plaintiff.

C. Liability of Red Stack on Account of the Red Stack Pilots' Agreement

For the reasons discussed in Part IV, supra, the verdict against Red Stack based on the pilots' agreement is against the clear weight of the evidence, and the damage award is excessive. A new trial must be granted on that issue.

D. Liability for Conspiracy (other than the Red Stack Pilots' Agreement).

Because plaintiff presented no separate damage claim under Section 1, the Court's disposition of the Section 2 claim on damage grounds disposes of this claim as well. In the event the judgment is reversed, however, and a new trial is ordered, plaintiff will be entitled to a new trial on the conspiracy is-

sue. (See Part V, supra)

In all other respects, defendants' motion for a new trial is denied.

CONCLUSION

For the reasons stated, defendants' motion for judgment notwithstanding the verdict is granted. In the alternative, defendants' motion for a new trial is granted to the extent stated above, conditional on reversal of the judgment. Each party shall bear its own costs.

IT IS SO ORDERED.

EXHIBIT A

VERDICT

We the jury, unanimously find

A. On plaintiff's claim under Section 1 of the Sherman Act:

1. Were the defendants Shipowners & Merchants Towboat Co., Bay Cities Transportation Co., and Crowley Maritime Corp. capable of entering into an unlawful conspiracy?

Yes _____

No _____

2. (If the answer to # A.1 is yes) Did defendants engage in one of the conspiracies in restraint of trade in violation of Section 1 referred to below?

Yes _____

No _____

3. (If the answer to # A.1 and # A.2 is yes) Did defendants engage in a conspiracy in restraint of trade in violation of Section 1?

a. To exclude plaintiff from shipwork on the Bay?

Yes _____

No _____

b. To exchange price information concerning tugboat services?

Yes _____

No _____

4. (If the answer to # A.3a or # A.3b is yes) Was the conspiracy a proximate cause of damage to plaintiff's business or property?

Yes _____

No _____

5. (If the answer to # A.4 is yes) State the amount of damage you find to have been proximately caused to plaintiff by each defendant you find to have violated Section 1:

Shipowners: $_____

Bay Cities: $_____

Crowley Maritime: $_____

Total Damages Awarded: $_____

6. a. Was the agreement between Shipowners and the Red Stack Pilots Association one that was intimately related to the wages or working conditions of the members of the Association or employees of Shipowners?

Yes _____

No X

b. (If the answer to # A.6a is no) Was the agreement in # A.6a an unreasonable restraint of trade?

Yes X

No _____

c. (If the answer to # A.6b is yes) Was the agreement a proximate cause of damage to plaintiff's business or property?

Yes X

No _____

d. (If the answer to # A.6c is yes) State the amount of damage you find to have been proximately

caused to plaintiff as a result of the agreement.

$100,000.00

B. On plaintiff's claim under Section 2 of the Sherman Act:

1. Did defendants monopolize trade or commerce in violation of Section 2?

Yes X

No _____

2. Did defendants attempt to monopolize trade or commerce in violation of Section 2?

Yes X

No _____

3. (If the answer to # A.1, above, is yes) Did defendants conspire to monopolize trade or commerce in violation of Section 2?

Yes _____

No _____

4. (If the answer to # B.1 or # B.2 or # B.3 is yes) Was the violation by defendants of Section 2 a proximate cause of

damage to plaintiff's business or property?

Yes ___X___

No _____

5. (If the answer to # B.4 is yes) State the amount of damage you find to have been proximately caused to plaintiff by each defendant you find to have violated Section 2:

Shipowners	$ 160,000.00
Bay Cities	$ 80,000.00
Crowley Maritime	$ 180,000.00
Thomas B. Crowley	$ 180,000.00
Total Damages Awarded	$ 600,000.00

C. On plaintiff's claim under the California Unfair Practices Act:

1. Did defendants make secret payments in violation of Section 17045?

Yes ___X___

No _____

2. (If the answer to # C.1 is yes) Was defendants' violation of Section 17045 a proximate cause of damage

to plaintiff's business or property?

Yes _____

No ___X___

3. (If the answer to # C.2 is yes) State the amount of damage you find to have been proximately caused to plaintiff by each defendant you find to have violated Section 17045:

Shipowners $_____

Bay Cities $_____

Crowley Maritime $_____

Thomas B. Crowley $_____

Total Damages Awarded $_____

D. On counterclaimants' claim under the California Unfair Practices Act:

1. Did counterdefendant make secret payments in violation of Section 17045?

Yes ___X___

No _____

2. (If the answer to # D.1 is yes) Was counterdefendant's violation of Section 17045 a proximate cause of damage to counterclaimant's business or pro-

perty?

Yes _____

No ___X___

3. (If the answer to # D.2 is yes) State the amount of damage you find to have been proximately caused to counterclaimants by counterdefendants' violation of Section 17045:

Murphy Tugboat $_____

Roger Murphy $_____

Total Damages Awarded $_____

Date: 8/21/78

/s/ Marie Van Arsdale
FOREPERSON

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MURPHY TUGBOAT COMPANY, Plaintiff, v. THOMAS B. CROWLEY, et al., Defendants.	)	No. C-74-0189 WWS AMENDED JUDGMENT
SHIPOWNERS & MERCHANTS TOWBOAT CO., LTD., et al., Counterclaimants, v. MURPHY TUGBOAT COMPANY, ROGER F. MURPHY, Counterdefendants.	)	

IT IS ORDERED that judgment be entered in this action as follows:

1. For defendants on all of plaintiff's claims;

2. For plaintiff and counterdefendant Roger Murphy on defendants' counterclaim.

Each party shall bear its own costs.

Dated: 3/15/79

WILLIAM W. SCHWARZER
[Signed]

Opposition

Office - Supreme Court, U.S.
FILED
FEB 25 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1323

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

MURPHY TUGBOAT COMPANY,
Petitioner,

VS.

SHIPOWNERS & MERCHANTS TOWBOAT CO., LTD.;
BAY CITIES TRANSPORTATION CO.; THOMAS B. CROWLEY;
CROWLEY MARITIME CORP.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. May an antitrust plaintiff ignore established methods of proof of damages and rely instead on speculation?

2. May Petitioner raise in this Court an issue it raised for the first time in its petition for rehearing in the court of appeals?

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW, JURISDICTION, AND STATUTES INVOLVED

Respondents accept Petitioner's statements on these points. However, in addition to the two opinions mentioned by Petitioner (Petition at 1), there is a second published opinion of the district court which was affirmed by the court of appeals: *Murphy Tugboat Co. v. Crowley* 454 F.Supp. 847 (N.D. Cal. 1978), *aff'd* 658 F.2d 1256, 1259 (9th Cir. 1981).

STATEMENT OF THE CASE

Since the subject Petition is confined to damage issues, Respondents adopt as their statement of facts the opinion of the court of appeals as it relates to damages:[1]

> "Even though the district judge concluded that the jury could properly find the boycott illegal and that it had an adverse impact on Murphy, he held that Murphy's proof of damages was insufficient in its Sherman Act section 2 claim. Although Murphy was not entirely consistent on the legal theory underlying its damages computation pursuant to section 2, the final theory contains two damage components. The first is lost profits attributable to Red Stack's boycott of jobs on which a Murphy tug was used, up to the time that Murphy ceased operation. The second component was lost future profits for the five years following its demise.
>
> * * * *
>
> A. *Past Profits.*
>
> "Murphy attempted to establish that prior to its going out of business it lost profits due to the Red Stack boycott. The district judge ruled its evidence was insufficient. Murphy's theory was that the boycott effectively prevented it from entering the more profitable segment of the ship assist market—that segment embracing ships of over 14,000 tons and flat tows. The amount of these lost profits was not directly established. An expert economist did testify that, under his assumptions and absent the boycott, Murphy would have made a sufficient profit in the large vessel and

---

[1]Because of its decision on the damages issue, the court of appeals did not consider Respondents' argument that there was no illegal "boycott."

flat tow market segment to bring Murphy's total shipwork business out of the red and into the black. Because no evidence was admitted of the dollar amount by which Murphy would have exceeded the breakeven point, the expert witness's understanding of Murphy's losses constituted the only lost past profits figure before the jury. Thus, Murphy's losses are relevant, not because those losses themselves were directly attributable to the illegal conduct, but because Murphy's expert witness used the loss figure as a bench mark by testifying that lost past profits would at least have equaled that figure. The figure, according to Murphy's citation to the record, came from Roger Murphy's testimony on the basis of his income tax records. We need not, however, start with those tax records and engage in a dollar for dollar examination of the maximum figure supported by the record, because we conclude that the damages theory has fundamental problems that make it unacceptable as a whole, whatever the appropriate bench mark figure were to turn out to be.

"The heart of Murphy's lost past profits damages theory is that, absent the boycott, Murphy would have obtained a significant share of the large vessel and flat tow segment of the market. There was evidence that the marginal revenue generated in this segment of the market would have been greater than Murphy's historical marginal operating costs. The theory is that this added profit would have been sufficient to overcome the historical operating losses. The expert witness suggested three different strategies that Murphy might have pursued in the absence of the Red Stack boycott. In each case, the bench mark figure of new profits would have been reached only if Murphy achieved at least a share of approximately 14% of the large vessel and flat tow market segment.

"Murphy contends that the 14% market share is conservative in the light of the fact that Murphy's share of the small vessel market segment approximated 28%. Murphy argues that, absent the boycott, it is to be expected that it would enjoy the same share of the large vessel market segment as it enjoyed in the small vessel market segment. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 118-19, 89 S.Ct. 1562, 1573-74, 23 L.Ed.2d 129 (1969). Murphy offered evidence that its capacity was sufficient to absorb this additional market share.

"Other aspects of Murphy's theory, however, rely upon differences between the two separate market segments. We must examine these differences to determine whether the evidence presented was sufficient for the jury to make a just and reasonable inference that Murphy's market share success in the small vessel market segment could be projected into the large vessel and flat tow market segment. *See Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906, 911 (2d Cir.), *cert. denied*, 369 U.S. 865, 82 S.Ct. 1031, 8 L.Ed.2d 85 (1962).

"The most important difference, and the key to Murphy's relative success in the one market segment and its nearly complete foreclosure from the other, is that large vessel and flat tow shipwork requires, statistically, more tugs per job. In particular, it requires the availability of additional tugs in case difficulty is encountered. Because Red Stack had considerable excess capacity, under Murphy's own capacity calculations, Red Stack would almost always be in a position to provide all the tugs for those customers preferring to use the Red Stack equipment. Murphy would be called upon only where there was a prefer-

ence to have at least one of Murphy's tugs instead of Red Stack's.

"The large vessel and flat tow market segment typically requires multiple tugs per job. Murphy's figures indicate that the average is 2.2 tugs per job. Thus, the per job preference for Murphy would have to be higher than its per tug market share. For example, for the period during which Murphy had only one large tug in operation, if all large vessel jobs had required two tugs, then in order for Murphy to have a 28% per tug market share there would have to be a preference to use a Murphy tug, rather than all Red Stack tugs, for 56% of the jobs. Using Murphy's average figure of 2.2 tugs per job, and assuming preference for Murphy's equipment to be distributed evenly across jobs using different numbers of tugs, there would need to have been a preference of 61.6% in favor of the use of Murphy's large tugboat in order that Murphy should enjoy its 28% market share on a per tug basis. The corresponding figure in order for Murphy to enjoy the 14% market share that Murphy's expert testified would wipe out the loss and produce a slight profit, is a 30.8% preference for the use of Murphy equipment on a per job basis. These preference figures would be somewhat lower if the preference for Murphy tugs were expressed disproportionately in the jobs requiring one or two tugs and less in the jobs requiring three or more tugs. Nonetheless, we can properly assume that for Murphy to obtain a given market share in the large vessel and flat tow market segment, it would require a greater preference for Murphy equipment than would the same market share in the small vessel market segment. This reduces the plausibility of a simple projection from the small vessel market to the large vessel market and increases the importance

of the other evidence bearing on the question of the market share that Murphy could have been expected to achieve in the large vessel and flat tow market segment absent the boycott. We next consider that evidence.

"There was evidence that those responsible for ordering tugboats would have preferred that the Red Stack boycott policy not be in effect, and that the mixing of tugs from different companies be an available option when circumstances warranted it. There was, however, no evidence from which the jury could assess the relative preference of customers for obtaining all the tugboats for a given job from one company when that was easily possible. Because Red Stack could always, or nearly always, provide all the tugboats for any job, some evidence on the strength or weakness of preference for the simplicity of ordering and billing and the unproblematical liability relations of unmixed tug jobs was needed before a jury could reasonably project Murphy's market share in the market segment for which multiple tugs were common. Thus the jury was left without necessary evidence to determine the impact of boycottless choice by customers who may well consider other reasons for wanting to work with a single tug company on a particular job.

"The expert witness's testimony as to Murphy's expected share in the large vessel and flat tow market segment depended upon an assumption that Red Stack would not cut its prices in reaction, even to a loss of over one-quarter of its prior share of this portion of the market. Murphy argued that Red Stack had never cut its prices, and that there was no reason to believe that it would have done so under the hypothetical circumstances. A reasonable jury could not, however, indulge in the assumption that a competitor would

follow a course of behavior other than that which it believed would maximize its profits. *See Knutson v. Daily Review, Inc.*, 548 F.2d 795, 812 (9th Cir. 1976), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 (1977). Just as there was no need for Murphy to prove that it would adopt a variant of the Red Stack grid price system and raise its prices if that would be in Murphy's economic best interest, so Red Stack need not introduce evidence to show that it would have reduced its prices if that would have increased its profitability by preserving a larger market share. In a hypothetical economic construction, such as the one underlying Murphy's theory on lost past profits, economic rationality must be assumed for all competitors, absent the strongest evidence of chronic irrationality. Otherwise it will be impossible to keep speculation in check.

"Murphy contends that it enjoyed a relative cost advantage over Red Stack. Red Stack's higher labor costs, it argues, would have put a limit on Red Stack's ability to cut prices. It was not demonstrated, however, just where this limit was. The jury was given no reason to believe that Red Stack could not have engaged in some price reductions in the large vessel and flat tow market segment. Indeed, Murphy argued that Red Stack's grid pricing system was so high in this segment of the market that it accounted for the extraordinary profitability of this segment as opposed to the small vessel segment. The charge for a Murphy tug plus a pilot was always less than half and at times as low as 41% of the Red Stack tug and pilot package. In the light of Red Stack's high charges in the large vessel and flat tow market segment, no jury could reasonably find that Red Stack could not significantly have cut its prices, in an attempt to protect its mar-

ket share. Because this key assumption of Murphy's economic expert was left without evidential basis, the jury could only have been engaging in unguided speculation when it found that Murphy would have achieved a sufficient market share to ensure a profitability that would have overcome its losses. Thus, there was on this element of damages insufficient "relevant data" for the jury to "make a just and reasonable estimate." Instead the verdict can only have been "based on speculation or guesswork." *Bigelow v. RKO Radio Pictures, Inc., supra,* 327 U.S. at 264, 66 S.Ct. 815, 90 L.Ed. 1040.

"B. *Lost Future Profits.*

Murphy's damages theory with respect to lost future profits starts out where its theory on lost past profits concluded. It assumes that, absent the boycott, Murphy would have been profitable because of its increased market share in the large vessel and flat tow market segment. Therefore, instead of going out of business in 1975, Murphy would have continued in business and would have made profits for at least the next five years. These profits were then calculated by projecting Murphy's actual historical revenue and multiplying that by Bay Cities' lowest rate of profit during the years of Murphy's existence. Because the jury could not reasonably have reached the first step of Murphy's argument, that absent the violation Murphy would have been a profitable enterprise, they could not reasonably have inferred that Murphy would remain in operation after 1975. Therefore, there is insufficient support in the record for the awarding of lost future profits."

Murphy Tugboat Co. v. Crowley, 658 F.2d 1256, 1260-63 (9th Cir. 1981) (footnotes omitted).

REASONS FOR DENYING THE WRIT

The petition should be denied because there is no conflict among the courts of appeal in different circuits, and the petition presents no federal question not already decided by this Court.

The opinions of the federal district court and the Ninth Circuit Court of Appeals below expressly followed the decisions of this Court in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969). E.g., *Murphy Tugboat Co. v. Crowley*, 454 F.Supp. at 852; *Murphy Tugboat Co. v. Shipowners*, 467 F.Supp. 841, 862-63 (N.D. Cal. 1979); *Murphy Tugboat Co. v. Crowley*, 658 F.2d at 1260-61. This Court would have to overrule or severely limit the application of these cases in order to give the Petitioner the relief it seeks, a result unwarranted by the facts of this case.

The nominal damage question was not raised in the district court or on appeal in the court of appeals:

> Because it was not argued before the district court or timely raised on appeal, we do not decide whether an antitrust plaintiff who has established injury but proved no quantum of damages may be entitled to nominal damages and/or costs.

Murphy Tugboat Co. v. Crowley, 658 F.2d at 1263 n.6.

Therefore, the petition for writ of certiorari must be denied.

ARGUMENT

I

THIS CASE PRESENTS NO NOVEL QUESTIONS OF LAW WITH REGARD TO DAMAGES.

Petitioner contends that the court of appeals' decision "amounts to a repudiation of established authority. . . ." (Petition at 14) Contrary to that assertion, the decisions of both the district court—in granting judgment notwithstanding the verdict for defendants—and the court of appeals—in affirming the judgment—applied settled law.

The district court expressly recognized the established rules for damages in market exclusion cases:

> "(1) Comparison of plaintiff's performance before and after the wrongful conduct under otherwise similar conditions; *Bigelow v. RKO Radio Pictures, Inc., supra,* 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652; *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U.S. 359, 376-78, 47 S.Ct. 400, 71 L.Ed. 684 (1927); *Pacific Coast Agricultural Export Association v. Sunkist Growers, Inc.,* 526 F.2d 1196, 1206-07 (9th Cir. 1975), *cert. denied,* 425 U.S. 959, 96 S.Ct. 1741, 48 L.Ed.2d 204 (1976);
>
> "(2) Comparison of performance in restrained and unrestrained markets which are otherwise comparable; *Zenith Radio Corp. v. Hazeltine Research, Inc., supra,* 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129; *Bigelow v. RKO Radio Pictures, Inc., supra,* 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652; *Richfield Oil Corp. v. Karseal Corp.,* 271 F.2d 709, 714-15 (9th Cir. 1959), *cert. denied,* 361 U.S. 961, 80 S.Ct. 590, 4 L.Ed.2d 543 (1969); or
>
> "(3) Loss of specific business or customers; *Herman Schwabe, Inc. v. United Shoe Machinery Corp.,* 297

F.2d 906, 913 (2nd Cir.), *cert. denied,* 369 U.S. 865, 82 S.Ct. 1131, 8 L.Ed.2d 85 (1962).

> "Plaintiff offered no 'before and after' evidence, nor did it offer evidence of loss of particular sales."

Murphy Tugboat v. Shipowners & Merchants Towboat, 467 F.Supp. 841 at 863.

Petitioner did not choose to offer proof on any established theory. It relied instead on an opinion of an "expert" with no experience in the tugboat business. The court of appeals held that his opinion as to Petitioner's market share in the market from which it was allegedly excluded was speculative:

> "Because this key assumption of Murphy's economic expert was left without evidential basis, the jury could only have been engaging in unguided speculation when it found that Murphy would have achieved a sufficient market share to ensure a profitability that would have overcome its losses. Thus, there was on this element of damages insufficient 'relevant data' for the jury to 'make a just and reasonable estimate.' Instead the verdict can only have been 'based on speculation or guesswork.' *Bigelow v. RKO Radio Pictures, Inc., supra,* 327 U.S. at 264, 66 S.Ct. 815, 90 L.Ed. 1040."

Murphy Tugboat Co. v. Crowley, 658 F.2d at 1262-63 (footnote omitted). The court of appeals noted that petitioner's *own* theory relied upon differences between the two markets. *Id.* at 1261.

The district court's opinion sets forth in detail all the speculative aspects of the expert's theory: differences in the nature of the two markets; lack of logical relation between Petitioner's losses in the small vessel market and

hoped-for profits in the large vessel market; guesses as to profits in the large vessel market; speculation as to what Petitioner's rates would have been; speculation as to whether plaintiff could ever have made a profit. *Murphy Tugboat v. Shipowners & Merchants Towboat,* 467 F. Supp. at 864-66. Thus the opinion of Petitioner's expert should not have been admitted in the first place, and Petitioner should have been required to prove its losses according to established rules.[2]

Petitioner's policy argument that it would be "good" to allow plaintiffs to recover damages in market exclusion cases based on speculation is defeated by the fact that, as the district court noted, there are established methods for proving damages in such cases. Petitioner has never stated, and does not state in its petition, why such means were not used in Petitioner's case. One can only conclude that they were not used because Petitioner was not in fact damaged.

Furthermore, Petitioner had ample warning that its damage theories were fatally defective. In 1978, the district court rejected Petitioner's offer of proof of damages and specifically invited Petitioner to present "proof of damages based on other theories." *Murphy Tugboat Co. v. Crowley,* 454 F. Supp. at 849 n.1. Yet Petitioner failed thereafter to produce any viable damage evidence. Thus Petitioner has no equitable claim for relief on the ground of intrinsic fairness and public policy.

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[2]Even if this Court were to disagree with the court of appeals' decision that Petitioner's market share assumption was speculative, it would still be necessary to review these other elements of Petitioner's damage claim which were found to be based on speculation.

II

PETITIONER SHOULD NOT BE GIVEN JUDGMENT FOR NOMINAL DAMAGES BECAUSE THIS ISSUE WAS RAISED FOR THE FIRST TIME IN ITS PETITION FOR REHEARING IN THE COURT OF APPEALS.

This Court need not consider what should happen when an antitrust damage plaintiff establishes only liability and causation.[3] This is because Petitioner never raised the nominal damage question in the district court, despite every opportunity to do so,[4] and did not raise it in the court of

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[3]In the court of appeals, Respondents urged affirmance on the ground that, as a matter of law, the "boycott" evidence did not establish antitrust liability. For obvious reasons the court of appeals did not address this issue, but Respondents preserved this point on appeal.

[4]Petitioner's argument that this nominal damage claim was somehow made *sub silentio* (Petition at 17) is inexplicable in view of the district court's repeated requests for clarification of petitioner's damage requests and theories:

> "Plaintiff's damage theories have undergone several metamorphoses and no useful purpose would be served by recapitulating their evolution. At oral argument on these motions, the Court expressed its concerns on the damage issue and invited counsel to submit further memoranda setting out the theory and the substance of the supporting evidence. The following discussion then addresses plaintiff's position as most recently taken in its post-argument memorandum.
>
> "Regrettably, plaintiff chose not to respond to the Court's specific request at oral argument to address in its memorandum its theory of damages under the Red Stack pilots' agreement. The Court in this opinion has therefore had to rely on the arguments and theories previously urged by plaintiff on this aspect of the case."

Murphy Tugboat Co. v. Shipowners & Merchants Towboat, 467 F.Supp. at 863 n.20.

See also *Murphy Tugboat Co. v. Crowley* 454 F.Supp. at 849 n.1.

appeals[5] until its petition for rehearing. See Excerpt of Petition for Rehearing and Suggestion for Rehearing in Banc Pursuant to Rules 35 and 40, attached as Appendix A. Accordingly, the court of appeals—by means of an amendment to its opinion—properly refused to consider this issue because it was raised too late. Order denying rehearing, filed October 15, 1981, attached as Appendix B; Amendment of Opinion, filed October 15, 1981, attached as Appendix C.

The rules of this Court on petitions for certiorari similarly require that issues be properly raised in the court of appeals before they are considered here. *California v. Taylor,* 353 U.S. 553, 556, n.2 (1957); *Duignan v. United States,* 274 U.S. 195, 200 (1927).

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[5]Petitioner contends that "[p]rior to argument on appeal Petitioner tried to bring this issue to the fore by citing as additional authority to the court of appeals *Knutson v. Daily Review,* 479 F.Supp. 1263 (N.D. Cal. 1979), a recent case dealing exclusively with this issue and directly in Petitioner's favor." Petition at 17-18. That statement is a mischaracterization of the *Knudsen* decision which was an opinion and order awarding attorneys fees *after* plaintiff had recovered nominal damages. (*Ibid.*) Moreover, it is inconceivable that a party can claim to have raised an issue never mentioned in its 100-page brief or in oral argument merely by virtue of citing an "additional authority".

CONCLUSION

The petition for a writ of certiorari should be denied because the decisions below correctly recognized existing law and applied it to the facts of this case. In the trial court and the court of appeals, Petitioner urged an anomalous theory of damages based on an inadmissible opinion. The lower courts correctly ruled that Petitioner's damage theories were speculative.

The principal question raised in the petition—whether nominal damages and attorneys' fees should have been awarded—was not raised in a timely manner in the Ninth Circuit Court of Appeals and should not form the basis of this Court's decision on whether to grant the Petition.

Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

RICHARD J. ARCHER
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Attorneys for Respondents

Dated: February 1982

(Appendices follow)

Appendix A

In the United States Court of Appeals
For the Ninth Circuit

No. 79-4266

Murphy Tugboat Company,
Plaintiff-Appellant,

vs

Thomas B. Crowley, Shipowners &
Merchants Towboat Co., Ltd., et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California

PETITION FOR REHEARING AND SUGGESTION FOR HEARING IN BANC PURSUANT TO RULES 35 AND 40

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Murphy at 861.

The Court found no fault with the jury and district court's agreement on proof of the fact-of-injury. Opinion at 2048.

Plaintiff has gone to the very limits of its resources to enforce the antitrust laws. It has taken a monopolist to task and earned a jury verdict of monopolization against a formidable adversary. It has shown to the satisfaction of both judge and jury that it was injured by defendants' unlawful and anti-competitive monopolization.

Even if this Court should persist in its view that plaintiff's proof as to the amount of its damages was insubstantial, defendants are not entitled to judgment. At the very least, judgment should be entered for plaintiff and plaintiff should be granted a new trial solely on the issue of damages. *Murphy* at 867. If plaintiff cannot prove the amount of damages to the satisfaction of the court, plaintiff should be awarded nominal damages, its costs and attorneys fees pursuant to section 4 of the Clayton Act, in the manner that has been applied in this circuit. In *Knutson v. Daily Review, Inc.*, 479 F.Supp. 1263, 1267 (N.D. Cal. 1980), the district court reviewed the authorities in this circuit and others supporting nominal damages and attorneys fees, and stated:

> The Court's finding of liability and award of nominal damages clearly implies that plaintiffs were in fact "injured in [their] business or propert[y] by reason of anything forbidden in the antitrust laws" within the meaning of Section 4, thereby entitling them to "a reasonable attorney's fee." Also, the award of reason-

able attorney's fees is necessarily concomitant with this Court's decision that plaintiff's establishment of liability and the fact of damages entitled them to treble damages under 15 U.S.C. § 15 since that statute makes no distinction between the applicability of the treble damages and attorney's fees provisions therein.

* * *

Such fee awards obviously comport with the underlying purpose of Section 4 of facilitating the private enforcement of substantive antitrust policies, which is the "bulwark of antitrust enforcement." *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968), *See* Hammond, Stringent New Standards for Awards of Attorney's Fees, 32 Bus.Law. 523, 524-525 (1977); Comment, 60 Cal.L.Rev. 1656 (1972). Thus courts have awarded such fees where plaintiffs have recovered only nominal damages. *See Morning Pioneer, Inc. v. Bismarck Tribune Co.*, 493 F.2d 383, 390 (8 Cir. 1974) *cert. denied*, 419 U.S. 836, 95 S.Ct. 64, 42 L.Ed.2d. 63 (1974); *Osborn v. Sinclair Refining Co.*, 207 F.Supp. 856, 864 (D.Md. 1962), *rev'd on other grounds*, 324 F.2d 566, 575, (4 Cir. 1963). *See also Newberry v. The Washington Post Co.*, 438 F.Supp. 470, 483 (D.D.C. 1977) ($140,000 in fees awarded where 7 of the 10 plaintiffs recovered only nominal damages); *Finley v. Music Corp. of America*, 66 F.Supp. 569, 571-572 (S.D. Cal. 1946) (reasonable attorney's fee awarded where no damages were recovered); *cf. Burt v. Abel*, 585 F.2d 613, 617-618 (4 Cir. 1978) (fact of nominal damage recovery does not diminish plaintiff's eligibility for attorney's fees in civil rights action); *Perez v. University of Puerto Rico*, 600 F.2d 1, 2 (1 Cir. 1979) (same).

> The issue then is not whether plaintiffs are entitled to fees, but what amount constitutes "reasonable attorney's fees" in the instant case.

Knutson v. Daily Review, Inc., supra, at 1267-1268.

Nominal damages and attorneys fees should be awarded when injury-in-fact is shown, but the amount of damages is not properly calculated. *See Newberry v. Washington Post Co.*, 438 F.Supp. 470, 483 (D.D.C. 1977) (Gesell, J.); *Siegfried v. Kansas City Star Co.* 193 F.Supp. 427 (W.D. Mo. 1961), *aff'd* 298 F.2d 1 (8th Cir. 1962). *See also United Exhibitors v. Twentieth Century Fox Film Dist. Corp.*, 31 F.Supp. 316 (W.D. Pa. 1940). This is the only policy that vindicates the antitrust laws that plaintiff has labored to enforce. In *Fleer Corp. v. Topps Chewing Gum, Inc.*, 501 F.Supp. 485 (E.D. Pa. 1980), it was determined in an antitrust case that nominal damages and attorneys fees should be awarded and the court stated: "To the extent that the defendants, as a matter of antitrust policy, should be liable for a dollar figure for excluding *attempted* entry, an award of attorneys' fees will help to vindicate that policy." *Fleer Corp. v. Topps Chewing Gum, supra*, at 514 (emphasis in original).

B. The Panel's Conclusion That a Reasonable Jury Could Not Assume That the Monopolists Would Not Have Cut Prices if Plaintiff Had Been Able to Compete for the Large-Vessel Market Segment Overlooked Substantial Evidence That the Monopolists Never Cut Prices and Is Based on an Erroneous Economic Assumption

Plaintiffs attempted to measure its lost profits from the large-ship segment of the market, from which it was ex-

cluded, by comparing its market share of the small-ship segment of the market in which it was allowed to compete. Plaintiff presented substantial evidence of the comparability of the small-ship and large-ship market segments.

The Opinion reasoned that it was speculative for the jury to conclude that plaintiff would have achieved even one-half as much of the large-vessel segment of the market as it had of the small-vessel segment because the jury should have assumed that defendants would have dealt with plaintiff's competition by cutting prices. Opinion at 2051. Since plaintiff produced substantial evidence that price cuts were unlikely and defendants produced no evidence that they would have cut prices, this amounts to an irrebutable presumption. Further, the Opinion neglected to analyze the economic reasons that made it highly unlikely that monopolists with 86% of the market share would have cut prices. Finally, the Court's mathematical model which deduced that there would have to have been a preference for plaintiff's services (Opinion at 2050) assumed that plaintiff had only one large tug when in reality it had two large tugs during approximately 30% of its operations.

The Opinion cited *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969) as the controlling authority regarding the requisite standard of proof for establishing the amount of . . . .

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 79-4266
D.C. No. C-74-0189 WWS

Murphy Tugboat Company,
Plaintiff-Appellant,

vs.

Thomas B. Crowley; Shipowners & Merchants
Towboat Company, Ltd.;
Bay Cities Transportation Company;
Harbor Tug & Barge Company;
Tug Sea Cloud, Inc.; Tug Sea Fox, Inc.;
Tug Sea Horse, Inc.; Tug Sea King, Inc.;
Tug Sea Lark, Inc.; Tug Sea Lion, Inc.;
Tug Sea Prince, Inc.; Tug Sea Robin, Inc.;
Tug Sea Rover, Inc.; Tug Valiant, Inc.;
Tug Trojan, Inc.; Tug Atlas, Inc.; Tug Sea Wolf, Inc;
Crowley Launch & Tugboat Company;
Cary-Davis Tug & Barge Company and
Long Beach Tugboat Company, Inc.,
Defendants-Appellees.

ORDER
[Filed Oct. 15, 1981]

Appeal from the United States District Court
for the Northern District of California

Before: WALLACE and POOLE, Circuit Judges,
and SMITH,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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*Honorable Russell E. Smith, United States District Judge, District of Montana, sitting by designation.

Appendix C

United States Court of Appeals
For the Ninth Circuit

No. 79-4266
D.C. No. C-74-0189 WWS

Murphy Tugboat Company,
Plaintiff-Appellant,

vs.

Thomas B. Crowley; Shipowners & Merchants
Towboat Company, Ltd.;
Bay Cities Transportation Company;
Harbor Tug & Barge Company;
Tug Sea Cloud, Inc.; Tug Sea Fox, Inc.;
Tug Sea Horse, Inc.; Tug Sea King, Inc.;
Tug Sea Lark, Inc.; Tug Sea Lion, Inc.;
Tug Sea Prince, Inc.; Tug Sea Robin, Inc.;
Tug Sea Rover, Inc.; Tug Valiant, Inc.;
Tug Trojan, Inc.; Tug Atlas, Inc.; Tug Sea Wolf, Inc;
Crowley Launch & Tugboat Company;
Cary-Davis Tug & Barge Company and
Long Beach Tugboat Company, Inc.,
Defendants-Appellees.

AMENDMENT OF OPINION
[Filed Oct. 15, 1981]

Appeal from the United States District Court
for the Northern District of California

Before: WALLACE and POOLE, Circuit Judges,
and SMITH,* District Judge.

The Opinion filed in the above matter on May 11, 1981, is hereby amended as follows:

On page 2052 of the slip, right column, the following new footnote, footnote 6, is inserted at the end of the last line of the Opinion, following "n.o.v."

> Because it was not argued before the district court or timely raised on appeal, we do not decide whether an antitrust plaintiff who has established injury but proved no quantum of damages may be entitled to nominal damages and/or costs.

*Honorable Russell E. Smith, United States District Judge, District of Montana, sitting by designation.